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ILLEGAL ENFORCEMENT OF THE LAW

WILLIAM T. PLUMB, JR.*

"I think it a less evil that some criminals should escape than that the Government should play an ignoble part."

JUSTICE HOLMES

So spoke the Great Dissenter in *Olmstead v. United States*.¹ His words might well be the watchword of the struggle to curb illegal enforcement of the law.

Illegal enforcement in this country is an evil of no small proportions. Inefficient, delinquent or merely impatient police officers, who are frequently ill-trained, occasionally abuse their powers, sometimes from excessive but misguided zeal, sometimes to placate the popular clamor for the solution of a crime by producing a victim by fair means or foul. In their zeal to accomplish results, government officials may lose sight of the fact that they are the servants of the law, peculiarly charged with a duty to observe its spirit and its letter. Yet they must beware the sinister sophism that the end justifies the employment of illegal means to bring offenders to justice. The public respect for law, which is the fundamental prerequisite of law observance, can hardly be expected of people generally if the officers charged with its enforcement do not set the example of obedience to its precepts.²

Illegal arrests, both inside the state where the crime occurred and beyond its borders, are a major example of illegal enforcement. Corollary to this are illegal searches and seizures and tapping of wires. The practice of the "third degree" is a still more serious instance. The wrongfulness of all of these practices is generally conceded, and direct remedies of civil and perhaps criminal actions are regularly provided for such abuses. This article will be confined to the abuses named,³ and to the question of indirect checks upon them—*i.e.*, when the illegal act has been done and the accused is before the court, held under illegal process or incriminated by evidence illegally obtained, will the court disregard the wrongful act and retain the case or admit the evidence?

I. ILLEGAL ARRESTS

The law, in order to secure freedom from illegal restraint for trivial causes, provides that, except where the gravity of the offense seems to

*The writer wishes to express his deep appreciation for the many helpful suggestions and criticisms of Professor Lyman P. Wilson of the Cornell Law School.

¹277 U. S. 438, 470, 48 Sup. Ct. 564, 575 (1928).

²See NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (Government Printing Office 1931).

³Others that might be mentioned include entrapment and unfair tactics in the conduct of the trial. On the latter, see *op. cit. supra* note 2, at page 263.

justify an immediate arrest without a warrant or a crime has been committed in the presence of the person making the arrest, no arrest may lawfully be made unless a warrant has been issued after formal charge filed with the proper court.⁴ But a considerable number of arrests are made illegally, because to arrest without a warrant is often more convenient, saving time and trouble. Again, there is in many cases a natural temptation or an actual necessity to seize a suspect while it is yet possible, rather than to give him an opportunity to escape while the officer takes time to draw up an information and apply for and obtain a warrant.

When the accused has fled from the state, it becomes necessary to apply to the governor of the state where the crime occurred for a requisition directed to the executive of the state to which the accused has fled, demanding the fugitive's return. But the processes of extradition are slow, complicated, and inefficient. In these days of rapid transportation a criminal often can keep several jumps ahead of the law if extradition is attempted.

Furthermore, when the crime is one committed by the accused when he was not physically present in the state where it took effect, he is not extraditable under the Constitution⁵ and the federal act which implements it,⁶ for he has not fled from the state. Thus, there are a number of crimes for which one may not be extradited to the state where the crime was consummated yet for which he may not be punished in the state where he did the acts because no crime took effect therein. The classic example is *State v. Hall*.⁷ Hall and his accomplice shot a man. Being well advised or just lucky, they were standing in North Carolina, while the deceased was over the line in Tennessee. Upon a trial for murder in North Carolina, it was held that no murder had been committed in that state, and that one state cannot enforce the criminal laws of another or punish crimes against another state. Thereupon Tennessee demanded extradition, but the defendants were released on *habeas corpus* because they had not been in Tennessee and were not fugitives from its justice.⁸ As a result, they were immune from any punishment so long as they stayed out of Tennessee.

⁴On the general subject of the necessity for a warrant, see 2 R. C. L. 446-464; 2 AM. JUR. 7-36; 5 C. J. 389-421; 6 C. J. S. 575-608; Bohlen and Shulman, *Arrest With and Without a Warrant* (1927) 75 U. OF PA. L. REV. 485; Hall, *Legal and Social Aspects of Arrest Without a Warrant* (1936) 39 HARV. L. REV. 566; Waite, *Public Policy and the Arrest of Felons* (1933) 31 MICH. L. REV. 749; Wilgus, *Arrest Without a Warrant* (1924) 20 MICH. L. REV. 541, 673, 798.

⁵U. S. CONST. Art. IV § 2, Cl. 2: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

⁶18 U. S. C. A. § 662 (1927).

⁷114 N. C. 909, 19 S. E. 602 (1894) (murder trial); 115 N. C. 811, 20 S. E. 729 (1894) (extradition); note (1895) 7 GREEN BAG 201. In the extradition case, there was a vigorous dissent pointing out the danger involved in such a rule.

⁸That this is the construction of the federal law was settled by *Hyatt v. Corkran*, 188 U. S. 691, 23 Sup. Ct. 456 (1903).

Less striking but more frequent cases in the same class are the procurement of a crime to be committed by another in a different state, frauds carried on by mail,⁹ bombs and poison sent through the mail, and non-support of one's family which is then resident in another state.

Another cause of dissatisfaction with the extradition process is that, for one reason or another, governors sometimes elect to disregard the plain duty laid down by the law, and refuse to surrender a fugitive. It is settled that the governor of the state where the fugitive is found has no discretion to refuse to extradite, if he is satisfied simply that the accused is charged with a crime under the laws of the demanding state, that he is a fugitive from justice, and that he is the man sought.¹⁰ But if the governor refuses to issue a warrant, it is equally well settled that it is beyond the power of the courts to compel him to do so.¹¹

As a result of these defects in the extradition procedure, there is a serious

⁹Use of the mails to defraud is now a federal offense, 18 U. S. C. A. § 318 (1927), so this large class of crimes is taken care of.

¹⁰*Biddinger v. Comm'r of Police*, 245 U. S. 128, 134, 38 Sup. Ct. 41 (1917).

¹¹In *Kentucky v. Dennison*, 24 How. 66 (U. S. 1861), Chief Justice Taney declared that the Constitutional provision was not a mere compact of peace and comity between nations who had no claim upon each other for mutual support, but a compact binding them to aid each other in executing their laws, and that harmony between the states required that one state should not harbor and protect another's criminals; that the duty to surrender fugitives was absolute, subject to no discretion on the part of the state where they are found; that the provision is substantially identical with that in the Articles of Confederation, when the Confederation was a league of separate sovereignties, under which provision, by analogy to international rendition, the executive of the state was the one of whom the demand was made, and upon whom the duty rested; that although the Constitution does not specify what officer shall be bound to surrender the fugitive (see *supra* note 5), it impliedly adopted the same procedure when it adopted the language of the Articles, and this was the construction placed upon it by Congress in enacting the Extradition Act (*supra* note 6). Having thus concluded that the Constitution should be construed as imposing an absolute duty on the governor, the Court then turns around and holds that it is only a moral duty and that there is no power to compel him to act; for if the General Government could impose any duty on the officers of a state, as such, and compel them to perform it, it would be within the power of Congress to load state officials with duties, which might be incompatible with their rank and dignity and so heavy as to disable them from performing their obligations to the state; that Congress may authorize a state officer to perform a duty, but cannot compel it. This seems the most fatuous reasoning that ever emanated from the Court before the days of social legislation. For if, as was clearly stated, the Constitution itself impliedly imposed the duty on the governor, there is nothing unconstitutional in an act of Congress implementing this provision; although Congress may not impose duties on the states, surely the Constitution can! The truth probably is that this is another instance of hard cases making bad law. The fugitive in this case was accused of aiding the escape of slaves. The Governor of Ohio had refused to return him to Kentucky for trial. And March of 1861 was no time for the Supreme Court to appear to line itself up on the wrong side of the slavery question!

Since state laws implementing the federal act also impose such a duty on the governor, it might be possible to mandamus the governor in the state court. No case has been found in which this was attempted, however. The authorities are in conflict on the power of the courts to compel the exercise of ministerial duties by the governor. It is denied in *New York, People ex rel. Broderick v. Morton*, 156 N. Y. 136, 50 N. E. 791 (1898), but there is no weight of authority. The cases are collected in a complete annotation in (1936) 105 A. L. R. 1124. But even if mandamus is granted, it merely changes the form of the duty, and there is no way to enforce it.

temptation to ignore its requirements and forcibly return the fugitive to the offended state, frequently with the open connivance of the officers of the state where he is found. In a number of cases, this summary action has been accompanied by violence and a flagrant disregard of the criminal law by those charged with its enforcement.¹² Cases of this nature frequently gain great notoriety in the press and tend to lower public respect for the law, to say nothing of the individual wrong to the accused.

Illegal arrests, within and without the state, must be discouraged. Direct remedies, civil and criminal, are said to be ineffective. Shall we, then, as the only practical means to safeguard individual liberties, deny to the court the right to try a defendant who has been illegally arrested? With substantial unanimity the courts have refused to impose this additional sanction upon illegal arrests, even when the question was duly raised by *habeas corpus* or a plea to the jurisdiction,¹³ although a small number of

¹²It must, however, be borne in mind that most of these cases came up on demurrers to the accused's allegations and his necessarily highly colored account was taken as true for purposes of the decision.

¹³*Illegal arrest within the jurisdiction*: *In re Johnson*, 167 U. S. 120, 17 Sup. Ct. 735 (1897) (defendant held even though he raised question on *habeas corpus* before trial); *Albrecht v. United States*, 273 U. S. 1, 47 Sup. Ct. 250 (1927); *People v. Brown*, 368 Ill. 177, 13 N. E. (2d) 272 (1938) (issue not raised in trial court); *State v. May*, 57 Kan. 428, 46 Pac. 709 (1896); *Commonwealth v. Tay*, 170 Mass. 192, 48 N. E. 1086 (1898); *Commonwealth v. Gorman*, 288 Mass. 294, 192 N. E. 618 (1934); *People v. Miller*, 235 Mich. 340, 209 N. W. 81 (1926); *State ex rel. Brown v. Fitzgerald*, 51 Minn. 534, 53 N. W. 799 (1892); *State v. DeHart*, 129 Atl. 427 (N. J. C. P. 1925) (preliminary motion to the jurisdiction); *People v. Eberspacher*, 79 Hun 410, 29 N. Y. Supp. 796 (Gen'l Term, 2d Dep't 1894); *People v. Iverson*, 46 App. Div. 301, 61 N. Y. Supp. 220 (2d Dep't 1899); *In re Durant*, 60 Vt. 176, 12 Atl. 650 (1888); *Ex parte Krans*, 1 B. & C. 258, 107 Eng. Rep. 96 (K. B. 1823); *Rex v. Marks*, 3 East 157, 102 Eng. Rep. 557 (K. B. 1802) (both on *habeas corpus*); *Rex v. Hughes*, 4 Q. B. D. 614, 14 Cox Crim. 284 (1879) (no preliminary objection); *Rex v. Iaci*, [1924] 3 D. L. R. 321 (Br. Col. Sup. Ct.); *Rex v. McLatchy*, [1923] 3 D. L. R. 291 (New Bruns. Sup. Ct. App. Div.); *Rex v. Flavin*, 56 D. L. R. 666 (Nova Scotia Sup. Ct. 1921). *Cf. In re Johnson*, 40 Cal. App. 242, 180 Pac. 644 (1919) (rule applied to administrative agencies; petitioner arrested without warrant, found to have contagious disease, so confined by health officer, *habeas corpus* denied).

Illegal arrest in and removal from another state: *Mahon v. Justice*, 127 U. S. 700, 8 Sup. Ct. 1204 (1888) (*habeas corpus*); *Cook v. Hart*, 146 U. S. 183, 13 Sup. Ct. 40 (1892); *Pettibone v. Nichols*, 203 U. S. 192, 27 Sup. Ct. 111, 7 Ann. Cas. 1047 (1906) (*habeas corpus*); *Ex parte Barker*, 87 Ala. 4, 6 So. 7 (1888) (*habeas corpus*); *State v. Chapin*, 17 Ark. 561 (1856); *In re Moyer*, 12 Ida. 250, 85 Pac. 897, 12 L. R. A. (n.s.) 227 (1906) (*habeas corpus*); *State v. Ross*, 21 Iowa 467 (1866); *State v. Chandler*, 158 Minn. 447, 197 N. W. 847 (1924); *Balbo v. People*, 80 N. Y. 484, 499 (1880); *Mathews v. State*, 19 Okla. Cr. 153, 198 Pac. 112 (1921); *State v. Owen*, 119 Ore. 15, 244 Pac. 516 (1926); *Dow's Case*, 18 Pa. 37 (1851, per Gibson, C. J.) (*habeas corpus*); *State v. Smith*, 1 Bailey Law 283, 19 Am. Dec. 679 (S. C. 1829) (*habeas corpus*); *Brookin v. State*, 26 Tex. App. 121, 9 S. W. 735 (1888); *In re Miles*, 52 Vt. 609 and note (1875); *State v. McAninch*, 95 W. Va. 362, 121 S. E. 161 (1924); *Kingen v. Kelley*, 3 Wyo. 566, 28 Pac. 36, 15 L. R. A. 117 (1891).

Illegal arrest in and removal from a foreign country: *Ker v. Illinois*, 119 U. S. 436, 7 Sup. Ct. 225 (1886); *United States v. Unverzagt*, 299 Fed. 1015 (W. D. Wash. 1924), *aff'd on other grounds, sub nom. Unverzagt v. Benn*, 5 F. (2d) 492 (C. C. A. 9th 1925), *cert. denied*, 269 U. S. 566, 46 Sup. Ct. 24 (1925), note (1924) 13 Geo. L. J. 70 (apparently the first case holding that the federal courts themselves would take advantage of an illegal arrest abroad; earlier cases merely held that a trial by the state

courts have held that such an arrest was a bar to prosecution, at least where raised by a preliminary plea to the jurisdiction.¹⁴

The question of the effect of lack of extradition first reached the United States Supreme Court, final arbiter of the meaning of the Constitution and the federal statute and treaties involved, in *Ker v. Illinois*.¹⁵ The accused had fled to Peru, and the President had issued an extradition warrant to an officer, who went after him. But instead of presenting his papers to the

violated no constitutional rights); *United States v. Insull*, 8 Fed. Supp. 310 (N. D. Ill. 1934) (the same); *People v. Pratt*, 78 Cal. 345, 20 Pac. 731 (1889); *Ker v. People*, 110 Ill. 627 (1884); *People v. Rowe*, 4 Parker Cr. 253 (N. Y. Super. Ct. 1858) (motion to quash indictment); *Lagrange's Case*, 14 Abb. Pr. N. S. 333 note, 45 How. Pr. 301 (N. Y. Sup. Ct. 1873); *State v. Brewster*, 7 Vt. 118 (1835); *Ex parte Scott*, 9 B. & C. 446, 109 Eng. Rep. 168 (K. B. 1829) (*habeas corpus*); *Re Walton*, 11 Ont. L. R. 94, 6 Ont. Week. R. 905 (1905) (*habeas corpus*).

Cf. United States ex rel. Voight v. Toombs, 67 F. (2d) 744 (C. C. A. 5th 1933), *appeal dismissed*, 291 U. S. 686, 54 Sup. Ct. 442 (1934) (illegal removal between federal judicial districts).

An interesting variant is the question whether one illegally brought into a state is subject to extradition from there to the state whose agent brought him that far without extradition. *Ex parte Ponzi*, 106 Tex. Cr. 58, 290 S. W. 170 (1926) (interstate arrest; *habeas corpus* denied); see *contra, In re Jones*, 54 Cal. App. 423, 201 Pac. 944 (1921) (removal from Mexico to California, extradition to Oklahoma; strong dictum, but removal was found to have been lawful).

¹⁴As to courts of general jurisdiction, the cases are rare, and vary as to whether the unlawfulness of the arrest must be seasonably raised or is fatal to the jurisdiction (only *dicta* can be found on the latter rule, for in all these cases the issue appears to have been duly raised). *Tennessee v. Jackson*, 36 Fed. 258, 1 L. R. A. 370 (E. D. Tenn. 1888) (*habeas corpus*: federal court released state prisoner; the case is undoubtedly overruled by later Supreme Court cases); *State v. Simmons*, 39 Kan. 262, 18 Pac. 177 (1888) (later strictly confined to violations of interstate comity, the general rule being applied to illegal arrests within the state; *State v. May*, 57 Kan. 428, 46 Pac. 709 [1896]); *Re Robinson*, 29 Neb. 135, 45 N. W. 267 (1890) (*habeas corpus*). These latter cases are not controlled by the United States Supreme Court decisions, which held only that no rights under the Federal Constitution and laws would be violated by trying a person so arrested.

In England, although a long line of King's (and Queen's) Bench cases followed the majority view (*supra* note 13), the Court of Exchequer went to the other extreme and held that a person unlawfully arrested must be released, and that no subsequent lawful arrest during such custody can cure the defect. *Att'y-Gen'l v. Cass*, 11 Price 345, 147 Eng. Rep. 494 (1822). An article in (1896) 32 CAN. L. J. 534 states that this is the general English and Canadian view, but the only cases there cited are cases of civil arrests, with which the writer of that note is unable to see a distinction (see *infra* note 30). In *Dixon v. Wells*, 25 Q. B. D. 249 (1890), Lord Chief Justice Coleridge expresses regret that his dictum in *Rex v. Hughes*, *supra* note 13, and other cases had been so broad as to exclude a preliminary objection to the jurisdiction, but he does not upset the rule, resting the case rather upon a special ground (see *infra*).

In Canada, the Provinces are in conflict, some of them following the majority view (the cases are cited *supra* note 13) and others holding squarely that they will release on preliminary motion. *Rex v. Linder*, [1924] 3 D. L. R. 505 (Alta. Sup. Ct. App. Div.); *Rex v. Suchaki*, [1924] 1 D. L. R. 971 (Man. Ct. App. 1923).

Statutes creating certain courts of limited jurisdiction, such as justice courts, may be construed as making a proper warrant a condition precedent to the court's jurisdiction. *People ex rel. Lawton v. Snell*, 216 N. Y. 527, 111 N. E. 50 (1916); *Harris County v. Stewart*, 91 Tex. 133, 41 S. W. 650 (1897); *Dixon v. Wells*, 25 Q. B. D. 249 (1890); see *State v. Wenzel*, 77 Ind. 428 (1881). But even in this case the requirement is waived by pleading, *People v. Burns*, 19 Misc. 680, 44 N. Y. Supp. 1106 (Co. Ct. 1897), and is cured by a subsequent lawful arrest while in custody. *People v. Bradley*, 58 Misc. 507, 111 N. Y. Supp. 625 (Co. Ct. 1908).

¹⁵119 U. S. 436, 7 Sup. Ct. 225 (1886), *aff'd* 110 Ill. 627 (1884).

Peruvian government, the officer and other armed men kidnapped the defendant and placed him on a naval vessel. He was taken to California, from which he was duly extradited to Illinois. Defendant pleaded to the jurisdiction, but his plea was overruled. He was convicted and appealed to the Illinois Supreme Court and finally to the United States Supreme Court. In each case he lost. It was held that the illegality of the arrest does not oust the jurisdiction of a court before which the accused is brought, or give him immunity from trial for a crime with which he is charged in a regular indictment. To his claim that the extradition treaty with Peru gave him a right of asylum, a positive right that he should be free from molestation and not forcibly removed except in accordance with the treaty, it was replied that the treaty merely restricts a country's freedom voluntarily to give him an asylum, but gives the individual no right to insist upon security there. The laws of Peru were violated in his capture, but that is a matter between that nation and the officer, who may himself be extradited and tried for the kidnapping.^{15a} But since the officer did not profess to act under the treaty, for he kept the extradition papers in his pocket, the defendant can claim no rights under it. The violation of the sovereignty of Peru by a federal officer is a political matter concerning only the two governments, in which the courts have no concern. It was *not* held, however, that the kidnapping might not give rise to an *international* obligation on the part of the United States to restore the kidnapped fugitive if the offended government demands it. It has long been the custom of our government to return kidnapped fugitives on the demand of the offended nation,¹⁶ and to demand the return of those so kidnapped from this country.¹⁷ A complication arises when the victim of the kidnapping is held by a state court, for the federal government has no authority to order the prisoner's release and the states frequently have been unwilling to honor a request to that effect.¹⁸

^{15a}Villareal v. Hammond, 74 F. (2d) 503 (C. C. A. 5th 1934) (granting extradition to Mexico of the officer who returned a prisoner without extradition).

¹⁶John Bassett Moore, in his *TREATISE ON EXTRADITION* (1891) vol. I, 282 ff., gives a number of illustrations gathered from State Department correspondence. Thus, in 1872, this government, on demand of the Canadian authorities, released a Dr. Bratton, who had been illegally seized in Canada and returned for trial on a federal charge. (p. 283). On the other hand, in 1906, the State Department cited the *Ker* case—although that case had not passed on the point—as authority for refusing a similar request from Mexico. [1906] 2 *FOREIGN RELATIONS* 1121-22.

¹⁷In 1841, one Grogan, who had been seized in Vermont by British soldiers and taken to Canada, was returned at the request of our government. I MOORE, *EXTRADITION* (1891) 282. Again in 1876, England granted our demand, although the man had been seized here not by English officers but by a private individual, acting in connivance with American officials, and although the prisoner had already been convicted in England. (p. 285, case of Blair). The case of Martin was more extreme: a naturalized citizen of this country was convicted in northern British Columbia; to get him to the jail at Victoria, he had to be taken through Alaska; the State Department demanded and obtained his release because of this violation of our sovereignty (p. 285).

¹⁸In 1850, England requested the return of one Bullock, who had been unlawfully seized in England by a Georgia sheriff and returned to Georgia for trial. The State

The holding in the *Ker* case that the defendant is subject to the jurisdiction of the court when he is brought before it, by whatever means, and may not himself raise the issue of the wrong to the foreign government, must be read in connection with the case of *United States v. Rauscher*,¹⁹ decided at the same time. There the fugitive was legally returned under an extradition treaty, but was tried for another crime than that for which he was extradited. It was held, in effect, that his surrender under the treaty was conditional and for a special purpose, and that the treaty impliedly forbade his trial for any other crime without his first being given an opportunity to return.²⁰ Here the individual was permitted to set up the rights of the foreign government under the treaty, and it is ably argued by Professor Dickinson²¹ that the same principle which applies to arrests in violation of a treaty should apply to arrests in violation of international law, and that the individual prisoner should in each case be permitted to raise the question of good faith toward the nation wronged. The Constitution makes a treaty part of the law of the land,²² and thus Rauscher was able to raise the question of its violation. But international law is part of our law as well²³ and Professor Dickinson asserts that the same rule should apply. However, if the offended nation makes no objection and if there is no treaty stipulation violated, it is difficult to see that any principle of international law requires the return of the fugitive.²⁴

Department referred it to the governor of Georgia, who refused to intervene, saying it was a judicial matter. I MOORE, EXTRADITION (1891) 291. Likewise, in 1879, one Cahill was abducted from Canada and tried in the Buffalo Superior Court. His return was demanded and the State Department referred it to the governor of New York and to the trial judge. But the prisoner was convicted and served his sentence (p. 292)

¹⁹119 U. S. 407, 7 Sup. Ct. 234 (1886).

²⁰In England, it is now provided by law that a fugitive shall not be surrendered unless provision is made, by the law of the foreign state or by arrangement, that he shall be detained for no offense committed prior to extradition, other than the one for which he is surrendered, without first being given an opportunity to return. EXTRADITION ACT of 1870 (33 & 34 Vict., c. 52), 8 HALSBURY'S STAT. ENG. 452, § 3 (2). A like immunity is given fugitives returned from other countries. *Id.* § 19. See also Article III of the Extradition Convention between the United States and Great Britain, 1889. (It may be found most conveniently on page 932 of *Gilbert's New York Criminal Code*, 1938.)

²¹Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law* (1934) 28 AM. J. INT. LAW 231. But see note (1935) 29 AM. J. INT. LAW 502.

²²U. S. CONST. Art. VI, cl. 2.

²³"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U. S. 677, 700, 20 Sup. Ct. 290, 299 (1900).

²⁴Even in the treaty cases, the lack of jurisdiction is waived by pleading to the indictment. *Ford v. United States*, 273 U. S. 593, 47 Sup. Ct. 531 (1927) (British liquor ship and men seized outside three-mile limit, in violation of treaty).

A unique variant of the treaty cases is *Dominguez v. State*, 90 Tex. Cr. 92, 234 S. W. 79 (1921), notes (1922) 18 A. L. R. 503, (1922) 20 MICH. L. REV. 536, (1922) 31 YALE L. J. 443. American soldiers, acting under orders from the War Department, pursued bandits across the Mexican border and brought them back; the defendant was brought back in the mistaken belief that he was one of them; on discovery of the mistake, he was turned over to the police to answer a prior charge of murder. The

The principle that one who is extradited under a treaty is immune from prosecution for any offense but the one for which he is extradited has no application to fugitives extradited between states under the Constitution.²⁵ In respect to fugitives, states do not occupy the relation of foreign nations. Interstate rendition is not effected by contract on which conditions may be imposed, but is required unconditionally by the supreme law of the land. It is not a favor which the state may withhold or grant conditionally. So, there being no law or treaty provision to the contrary, the general rule applies that one found within the jurisdiction may be tried for any crime charged to have been committed there, no matter how his presence was obtained. *A fortiori*, the principle of the *Ker* case would apply to persons illegally arrested in another state and brought back without extradition.²⁶

But a number of early cases had intimated that if the state whose sovereignty was violated by the kidnapping should demand the return of the accused, the demand would have to be granted.²⁷ This question shortly

State claimed that defendant was kidnapped and that the *Ker* case applied. But the court preferred to presume that the War Department was not ordering unlawful invasions but was acting under some privilege from Mexico, however informal, and if the terms of this privilege were violated by bringing back one other than the bandits being pursued, it was like a treaty violation and the *Rauscher* case applied. Therefore he must be returned.

The companion principles of the *Ker* and *Rauscher* cases apply to penal forfeitures of property. Thus, in an early case, the facts were that three American slave ships set sail from Havana to Pensacola in Spanish Florida, but upon their arrival they were greeted by the American army (General Jackson's Seminole expedition) which seized the ships and took them to Mobile, where they were libeled for forfeiture, having violated the law against American ships engaging in such trade, even wholly between foreign ports. As with persons wrongfully arrested, it does not now avail the ship or its owner that the seizure violated the sovereignty of a peaceful nation, for it is before the court and has violated the law. *The Merino*, 9 Wheat. 391 (U. S. 1824). Accord: *The Ship Richmond v. United States*, 9 Cranch 102 (U. S. 1815, Marshall, C. J.); *The Tenyu Maru*, 4 Alaska 129 (1910) (Japanese sealing schooner, whose crew had killed female seals in violation of law within the three-mile limit, was seized outside the limit and brought to port; forfeiture upheld). A like principle has been applied to forfeitures under the Prohibition and Revenue Acts, where automobiles and boats are seized without authority but the seizure is then adopted by the proper authorities. *Dodge v. United States*, 272 U. S. 530, 47 Sup. Ct. 191 (1926), in which Justice Holmes was careful to emphasize, without explaining, the distinction between forfeiture of property unlawfully seized and its use in evidence (see *infra* note 204).

A recent case has demonstrated that here, too, there is a *Rauscher* principle, and that if the seizure is not merely in violation of a foreign sovereignty but of a treaty, which is the law of the land, the ordinary incidents of the court's possession of the property yield to the treaty, and a forfeiture is not allowed. *Cook v. United States*, 288 U. S. 102, 53 Sup. Ct. 305 (1933). See Dickinson, *loc. cit. supra* note 21.

²⁵*Lascelles v. Georgia*, 148 U. S. 537, 13 Sup. Ct. 687 (1893), resolving a conflict among state decisions. However, the case holds only that no right under the Federal Constitution is involved, and a state is still free to refuse to try the defendant for another crime, as a matter of local policy. A substantial majority now follow the *Lascelles* case. See note (1922) 21 A. L. R. 1418.

²⁶See *supra* notes 13 and 14.

²⁷*Ex parte Barker*, 87 Ala. 4, 6 So. 7 (1888); *Dow's Case*, 18 Pa. 37 (1851); *Kingen v. Kelley*, 3 Wyo. 566, 577, 28 Pac. 36, 38 (1891). On the authority of the dictum of Chief Justice Gibson, "a greater judge than whom never lived," in *Dow's Case*, a Pennsylvania Common Pleas judge released a prisoner who had been kidnapped in New York after being decoyed from Canada. Governor Cleveland of New York had demanded

came before the United States Supreme Court in *Mahon v. Justice*.²⁸ This case arose out of the most famous blood-feud in American history. The Hatfields of West Virginia and the McCoys of Kentucky lived on opposite sides of the mountain stream that marks the state line. One August day in 1882, a Hatfield was mortally wounded by two of the McCoys in an election fight. The Hatfield clan took the two McCoys and their young brother into custody and held them in close confinement on the West Virginia side until the victim's death was announced. Thereupon, the McCoys were taken back to Kentucky and brutally murdered. Indictments were found, in Kentucky, against twenty-three members of the Hatfield clan, but they were safe at home over the line. They continued to make forays over the line, harassing the McCoys but always armed and in such numbers that prudent officers considered it advisable to return their warrants with the report "not found". Rich rewards were offered by the state but none was so bold as to seek to earn them. Finally, giving up hope of arresting them in Kentucky, the Governor requisitioned the Governor of West Virginia for their extradition. One Frank Phillips, a deputy sheriff, was appointed to receive the men when they should be surrendered by West Virginia, but the Governor of West Virginia, for reasons never satisfactorily explained, refused extradition, resulting in perhaps the most bitter exchange of correspondence that has ever passed between two governors. The outrages of the Hatfields continuing and growing more vicious, Phillips took matters into his own hands, gathered a band of armed men together and struck rapid and unexpected blows at the Hatfields, returning a number of them to jail in Kentucky. The Governor of West Virginia, shocked at this affront to his sovereignty, sued out a writ of *habeas corpus* in the federal court. It was refused and the Supreme Court affirmed, holding that although the fugitive, while in West Virginia, had the right not to be surrendered except in accordance with the extradition law, his presence in Kentucky and his detention under lawful process gave jurisdiction to the Kentucky court to try him for a crime committed within that state.²⁹ Of

his return, and the demand was granted at the instance of Pennsylvania's governor, not as a constitutional right of the accused but as a matter of comity. *Commonwealth ex rel. Norton v. Shaw*, 15 Weekly Notes 395, 6 Crim. L. Mag. 245 (Pa. C. P. 1884).

²⁸127 U. S. 700, 8 Sup. Ct. 1204 (1888).

²⁹Two justices dissented, saying that the Constitution provides a peaceable means of procuring the return of fugitives, with the object of preventing friction between the states both from their giving asylum to each other's criminals and from violent invasions for the purpose of returning them; that while it is purely the concern of the offended state when its sovereignty is thus violated, its demand for the fugitive's return should be honored if made.

The prisoners were subsequently convicted and sentenced to life imprisonment. *Hatfield v. Commonwealth*, 11 Ky. L. Rep. 468, 82 S. W. 309 (1889). In retaliation, Deputy Sheriff Phillips was indicted in West Virginia and tried for kidnapping, but he was freed after a long court battle—from which it may well be argued that the difficulty with direct remedies for illegal law enforcement is that juries judge the act by its results, and if a real criminal has been brought to justice, however illegally, few

course, the decision was only to the effect that no federal question was involved under the extradition laws. The state might still honor the demand as a matter of comity.

One important question remained: suppose that not an individual (and an officer acting without authority is no more) but the state itself, its governor and its militia, becomes the kidnapper, using the forms of extradition but conniving to evade its requirements. This is a different thing than for the state merely to insist that it will try an accused criminal found within its borders, irrespective of any wrongs done him by individuals. And many cases, in so holding, in effect reserved this other question. For, in pointing out the contrast with civil cases, in which a plaintiff is not allowed to take advantage of his own wrong in obtaining service,³⁰ they emphasized

juries would punish the offending officer. But would justice have been better served in this case by letting the Hatfields go free?

For a full account of the Hatfield-McCoy feud (from a McCoy viewpoint), see MUTZENBERG, *KENTUCKY'S FAMOUS FEUDS AND TRAGEDIES* (1917) 29-110.

³⁰The courts will usually set aside service of civil process procured by force or trick. *Snelling v. Watrous*, 2 Paige Ch. 314 (N. Y. 1830) (civil arrest by trick); *Bernstein v. Hakim*, 126 Misc. 582, 214 N. Y. Supp. 82 (A. T. 1st Dep't 1926) (service of summons by trick); *Anderson v. Abeel*, 96 App. Div. 370, 89 N. Y. Supp. 254 (1st Dep't 1904) (service by assault); *Birch v. Prodger*, 1 Bos. & P. (N. R.) 136, 127 Eng. Rep. 410 (1804) (plaintiff met defendant on the street and forcibly detained him until process could be procured); see note, *Ann. Cas.* 1916C, 612, 616. New York has now changed its rule as to service by fraud not involving enticement into the jurisdiction. *Gumperz v. Hofmann*, 245 App. Div. 622, 283 N. Y. Supp. 823 (1st Dep't 1935), *aff'd*, 271 N. Y. 544, 2 N. E. (2d) 687 (1936).

This is particularly important in cases where the civil defendant has been kidnapped or decoyed from his home into another jurisdiction, for "it is the right of a party defendant in a civil action to be sued in the forum of his domicile, though he may be sued in personal action in a foreign forum, if found there, if he went there voluntarily. If his presence there was procured by fraud or force, it does not subject him to a civil suit, or to the service of any civil process there." *Kingen v. Kelly*, 3 Wyo. 566, 570, 28 Pac. 36, 37 (1891) (dictum). *Accord*: *Commercial Mut. Acc. Co. v. Davis*, 213 U. S. 245, 256, 29 Sup. Ct. 445, 448 (1909) (dictum); *Hill v. Goodrich*, 32 Conn. 588 (1858); *Williams v. Reed*, 29 N. J. L. 385 (1862); *Carpenter v. Spooner*, 2 Sand. 717 (N. Y. Super. Ct. 1850); *Metcalf v. Clark*, 41 Barb. 45 (N. Y. Sup. Ct. 1864) (creditor arranged to meet his Canadian debtor for a conference in a store just over the line in Canada; he suggested that the debtor hitch his horse in a nearby shed—over the state line, where a process server was lurking); *Baker v. Wales*, 14 Abb. Pr. N. S. 331 (N. Y. Super. Ct. 1873) (plaintiff asked defendant to come in from Connecticut to negotiate a settlement; when the negotiations failed, he filled out a blank summons and served it; this would be all right if *bona fide*, but the court saw a general plan in the fact that a supply of blank summonses was kept in the office, so it was held a deceit); *Lagrave's Case*, 14 Abb. Pr. N. S. 333, 45 How. Pr. 301 (N. Y. Sup. Ct. 1873) (creditors obtained extradition of a storekeeper who had absconded to France by falsely representing that he was charged with burglary; on his return he was served with civil process; at that time, and until the enactment of CODE CRIM. PROC. § 855 in 1936, which restricts the right in certain cases, New York permitted service of civil process on persons brought there by extradition, *Adrian v. Lagrave*, 59 N. Y. 110 [1874]; but since the extradition was fraudulently procured, the creditors who participated in the fraud were prevented from serving him); *Garabettian v. Garabettian*, 206 App. Div. 502, 201 N. Y. Supp. 548 (1st Dep't 1923); *Stein v. Valkenhuyzen*, EL BL. & EL. 65, 120 Eng. Rep. 431 (1858). Cf. *Phelps v. Goddard*, 1 Tyler 60 (Vt. 1801) (damages allowed against those who decoyed a debtor into New York where he was sued in a civil action which was barred by lapse of time in Vermont but not in New York).

The same rule applies to civil proceedings *in rem*. In *Moynahan v. Wilson*, Fed. Cts.

that the state was guilty of no wrong.⁸¹

This question came before the Supreme Court in *Pettibone v. Nichols*.⁸² Like the *Mahon* case, this arose out of an era of unbridled lawlessness, a long drawn out labor war in which murder seems to have been the normal and usual weapon of both sides. Ex-Governor Steunenberg of Idaho, who had used troops to suppress a mine strike during his term, was killed by a bomb planted in his gate. The man who planted the bomb was captured and told a lurid tale of a great plot to murder governors, judges and others who had opposed the union. He accused Haywood, Moyer and Pettibone of complicity in the plot. These men were leaders of the radical Western Federation of Miners and had been in Colorado at the time of the crime, hence were not legally extraditable as "fugitives" from Idaho. But the Idaho authorities presented incorrect affidavits⁸³ to their governor to the effect that these men had been in Idaho and were fugitives from its justice. The Governor of Idaho, though later charged with knowledge of the falsity, made demand on the Governor of Colorado, who also was said to have been well aware of the truth. The arrest of the men on the extradition warrants was delayed until Saturday night, when judges and lawyers were not readily available—for as long as the men were in Colorado, they could be released on proof in court that the requisites of extradition had not been

No. 9897, 2 Flip. 130 (C. C. E. D. Mich. 1887), defendant had brought plaintiff's horse from a bailee; plaintiff wrote defendant that he had already arranged a match race and would lose a substantial wager unless defendant brought the mare into the state for the race; defendant was a good fellow, and he sent the horse, which was attached in replevin upon its arrival; the attachment was set aside. In *Houghton v. May*, 22 Ont. L. R. 434 (1910), a judgment creditor in Canada procured the setting adrift of his debtor's steamer on the American side, and he levied execution when it floated to the other bank. The levy was set aside. See also (1929) 42 HARV. L. REV. 439.

⁸²*Mahon v. Justice*, 127 U. S. 700, 706, 8 Sup. Ct. 1204, 1207 (1888); *State v. Ross*, 21 Iowa 467, 471 (1866); *People v. Rowe*, 4 Parker Cr. 253, 254 (N. Y. Super. Ct. 1858); *Lagrange's Case*, 14 Abb. Pr. N. S. 333, 343 (N. Y. Sup. Ct. 1873); *Kingen v. Kelley*, 3 Wyo. 566, 570-1, 28 Pac. 36, 37-38, 15 L. R. A. 177 (1891).

⁸³203 U. S. 192, 27 Sup. Ct. 111, 7 Ann. Cas. 1047 (1906), noted (1907) 16 YALE L. J. 347. *Habeas corpus* proceedings were brought in both the state and federal courts, and the release of the prisoners was denied in each case. Appeals from both actions were argued together in the Supreme Court. The state court decision is *In re Moyer*, 12 Ida. 250, 85 Pac. 897, 12 L. R. A. (n. s.) 227 (1906).

With this case, compare *People v. Pratt*, 78 Cal. 345, 20 Pac. 731 (1889), in which the accused escaped to Japan. The United States had no extradition treaty with Japan, and its policy in such a case was not to request extradition. So the Governor, who concededly had no authority to deal with foreign nations, made the request himself, and it was granted. The court held that even conceding that a wrong was done the defendant by the Governor, he may be tried by the court when found within the state. "The Governor of the state cannot oust the courts . . . of their right to try an individual charged with an offense over which they have jurisdiction, because of the fact that he has been instrumental in having the defendant there, by violation of his personal rights. It will not do to say that a fugitive from justice can escape the punishment for his crime because the Governor of a state may have violated some law. The people of a state are not bound by the illegal act of their Governor, nor should they be." 78 Cal. at 349.

⁸⁴The allegations of the petition for *habeas corpus* were taken as true for purposes of this appeal.

met.³⁴ It was claimed that they were rushed out of the state on a special train guarded by the militia, before any court action could be taken to protect them.

The case attracted nation-wide attention. The prisoners engaged Clarence Darrow as their chief counsel, and William E. Borah, then a newly elected Senator about to take his seat, led the prosecution. The first move of the defense, the only one which concerns us here, was a test of the state's right to hold the prisoners for trial when the state itself was the kidnapper. Denied release by both state and federal courts, appeals were taken to the Supreme Court,³⁵ but the Court held that once the accused is within the jurisdiction in which he is charged with crime, the extradition warrant, if any, has served its function and the court will not look to the manner of his arrest and rendition. This is equally true when the power of the state effects the illegal arrest and when it is done by an individual. The crime of the accused is not purged thereby, and when before the court he must stand trial.³⁶

Thus it is apparent that, by the great weight of authority, the court before which a defendant is brought, however illegally he may have been seized, locally or abroad, will not hesitate to take advantage of his presence and will try him. The interest of society requires that crime be punished, and all that the defendant is entitled to demand is a fair trial by a court having jurisdiction of the subject matter, in which he has an opportunity of knowing the charge and of being fully heard.³⁷

When a resident is indicted or is brought before the committing magistrate, the one really material inquiry is whether there is probable cause for

³⁴Either in the federal court, *Roberts v. Reilly*, 116 U. S. 80, 94, 6 Sup. Ct. 291, 299 (1885), or in the state court, *Robb v. Connolly*, 111 U. S. 624, 4 Sup. Ct. 544 (1884).

³⁵*Supra* note 32. Justice McKenna dissented.

³⁶Haywood and Pettibone were acquitted, the terrorist's confession being the only substantial evidence against them. The prosecution of Moyer was then dropped. DARROW, *THE STORY OF MY LIFE* (1932) 155, 169, 171.

Radicals asserted that the Supreme Court in the *Pettibone* case had legalized the kidnapping of fugitives from justice, and the editor of the Socialist *Appeal to Reason* decided to test the question "whether there is one law for the rich corporation and another for the poor man". For his test, he selected the case of ex-Governor Taylor of Kentucky. Taylor had been removed as Governor by the Legislature, under a law put through by his defeated rival, who thereupon was named Governor; but before the latter (Gov. Goebel) took over, he was shot by a person unknown, from the State House window; Taylor was accused of complicity, fled to Indiana; the Governor of Indiana refused extradition. The editor, one Warren, placed on his mailing envelopes an offer of \$1,000 reward to anyone who would kidnap Taylor and return him to Kentucky. His "test" ran afoul of the law against placing defamatory matter on the outside of mailing matter, and Warren was convicted. *Warren v. United States*, 183 Fed. 718, 33 L. R. A. (N. S.) 800 (C. C. A. 8th 1910). Darrow defended, but withdrew from the case and let Warren argue for himself, when the latter insisted on pressing the argument that kidnapping of fugitives had been legalized (but the court wholly ignored this point). The case has interest as demonstrating the false impression that the public may get when the courts take advantage of illegal acts of those charged with law enforcement.

³⁷*Ker v. Illinois*, 119 U. S. 436, 7 Sup. Ct. 225 (1886); *Regina v. Hughes*, 4 Q. B. D. 614, 14 Cox Crim. 284 (1879).

his commitment and trial. This is the same inquiry that would have been made if a warrant had been sought before bringing him in, and no more is necessary for the protection of the accused. A stronger practical argument on the other side can be made where the accused is brought illegally from another state. For, until trial, we must presume him innocent and, unlike a resident, he has been brought to trial before a foreign tribunal, governed by laws unknown to him, separated from his friends, from his witnesses, confined among strangers who know him only as an accused outlander whatever his reputation may have been at home.³⁸ To continue the presumption of innocence, he may never have been in the state where he stands accused, yet he has had no opportunity to demonstrate this to his own governor or his home courts. At first blush there is force in this argument, but it must be borne in mind that if he had been extradited, he would be in the same position, for these objections are inherent in our system which requires that the criminal defendant, unlike the civil defendant, must be tried where the crime is alleged to have occurred. An indictment duly found is all the protection a resident or a non-resident can claim even when all is lawful, for (apart from "discretionary" abuses by the governor) extradition is then virtually automatic.³⁹

II. ILLEGALLY OBTAINED EVIDENCE

While it is almost universally held that a person illegally arrested, by no matter how gross a violation of personal liberty and the public peace, will not be released on this account if probable cause for his detention appears, the admissibility of evidence obtained by a violation of law is not so freely conceded. Rather, it is a subject on which the most bitter controversy has raged for a quarter of a century. We should hesitate to add to the already great volume of legal literature on the subject had it not once more become a burning question in New York.⁴⁰

A. Scope of the Constitutional Provision

It is a basic principle of Anglo-American liberty that our "persons, houses, papers, and effects" shall be secure from *unreasonable* search and seizure.⁴¹ Under certain circumstances, no search warrant is required, when a search

³⁸See *Ex parte Smith*, 3 McLean 121, 136 (C. C. D. Ill. 1842).

³⁹It must be conceded, however, that on the one question of establishing his identity, the position of the accused is rendered worse by his removal without extradition.

⁴⁰The Constitutional Convention of 1938 bitterly debated the question, finally refused to exclude such evidence. The Legislature by the time this appears should have passed one of the bills referred to, *infra* note 94, adopting completely or partially the rule excluding illegally obtained evidence. (Note: Both bills have been shelved for this session.)

⁴¹U. S. CONST., 4th Amendment. Similar language is now found in the constitution of every state. New York was the last to adopt it (CONST. 1938, Art. I, § 12), having previously relegated this principle to a statute (CIVIL RIGHTS LAW § 8).

without a warrant is reasonable.⁴² When a warrant is necessary, it must be duly issued by a court, upon an affidavit that there is probable cause to believe that certain described property will be found. General warrants to search for and seize books and papers and other things lawfully possessed, though of evidential value, are not reasonable or lawful.⁴³ Warrants are justified only where a right of search and seizure may be found in the interest of the public or of the complainant in the property to be seized, or where a valid exercise of the police power makes possession of the property unlawful.⁴⁴

One's person may be searched only upon a warrant, except that when one is lawfully arrested, an officer may then search him and seize anything on his person or under his immediate control which may be useful as evidence of the crime for which he is arrested.⁴⁵ An arrest unlawful in its inception, however, is not made lawful by what is discovered by searching,⁴⁶ and a search pursuant to an unlawful arrest is likewise unlawful.

⁴²See the full discussion in *United States v. Snyder*, 278 Fed. 650 (N. D. W. Va. 1922).

⁴³*Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (1765); *Gould v. United States*, 255 U. S. 298, 41 Sup. Ct. 261 (1921); *State v. Sheridan*, 121 Iowa 164, 96 N. W. 730 (1903). Warrants to tap wires, such as are now provided for in New York, are inconsistent with this principle but have express constitutional authorization. N. Y. CONST. (1938) Art. I, § 12.

⁴⁴See *Gould v. United States*, *supra* note 43. The Court gives as examples: burglar tools, weapons, stolen or forfeited property, property subject to tax and the books required by law to be kept as to them, counterfeit money, and gambling implements. See also *Lefkowitz v. United States*, 52 F. (2d) 52 (C. C. A. 2d 1931), *aff'd*, 285 U. S. 452, 52 Sup. Ct. 420 (1932).

See the statutory enumerations in 18 U. S. C. A. § 612 and N. Y. CODE CRIM. PROC. § 792.

⁴⁵*People v. Chiagles*, 237 N. Y. 193, 142 N. E. 583 (1923). Although a search warrant may not issue for purely evidentiary articles (see *supra* note 43), a search in the course of an arrest may properly result in the seizure of evidence. Judge Cardozo thus rationalizes the rule: An officer making a lawful arrest may properly disarm his prisoner; for this purpose a search is necessary and lawful; and whatever is found by a lawful search he may retain if it is connected with the crime.

A general exploratory search of the room where the arrest is made is not justified under this principle. *Lefkowitz v. United States*, *supra* note 44. But articles exposed to view in the room may be seized if the officers are present pursuant to a lawful arrest. *Marron v. United States*, 275 U. S. 192, 48 Sup. Ct. 74 (1927).

⁴⁶The American Law Institute's Model Code of Criminal Procedure, however, in § 21 (b) makes an arrest lawful if a felony has in fact been committed by the one arrested, irrespective of the officer's probable cause for believing it at the time. This section is in force, in substance, in at least seventeen states: ALA. CODE ANN. (Michie 1928) § 3263; ARIZ. REV. CODE ANN. (Struckmeyer 1938) § 4937; CAL. PEN. CODE (Deering 1937) § 836; IDA. CODE ANN. (1932) § 19-603; LA. CODE CRIM. PROC. ANN. (Dart 1932) art. 60; MICH. COMP. LAWS (1929) § 17149; MINN. STAT. (Mason 1927) § 10570; MISS. CODE ANN. (1930) § 1227; MONT. REV. CODES ANN. (Anderson & McFarland 1935) § 11753; NEV. COMP. LAWS (Hillyer 1929) § 10751; N. Y. CODE CRIM. PROC. § 177; N. D. COMP. LAWS ANN. (1913) § 10567; OKLA. STAT. ANN. (1937) tit. 27, § 196; ORE. CODE ANN. (1930) § 13-2111; S. D. COMP. LAWS (1929) § 4553; TENN. CODE ANN. (Williams 1934) § 11536; UTAH REV. STAT. ANN. (1933) § 105-13-3. The same rule is adopted by case law in Missouri. *State v. Whitley*, 183 S. W. 317 (1916), but such cases are rare. The rule does not apply to misdemeanors.

Where this rule is inapplicable, it is held that "although the defendant ought to have been arrested, and in fact was arrested, such arrest was not warranted" because the officer lacked probable cause for the arrest when he made it.

The question of whether the constitutional meaning of "reasonable search" will

A house or place of business may not be searched without a warrant.⁴⁷ This principle has been repeatedly enunciated by champions of liberty, notably by Lord Chatham in Parliament just before the American Revolution: "A man's house is his castle;⁴⁸ it may be a straw hut, the wind may whistle around it, the rain may enter it, but the King cannot."⁴⁹

A mere trespass to land, other than the building where one dwells or does business, or the immediate surroundings thereof, is not a search within the meaning of the Constitution.⁵⁰ Therefore, officers trespassing in open fields, orchards, stables, and the like may be liable for damages, but they are not guilty of an unconstitutional search—a rule which is of great importance where evidence secured by a technical "search" is excluded.⁵¹ Furthermore, a "search" implies a prying into hidden places for what is concealed, and when actions or articles are visible to the eye, no "search" is committed in their discovery, even though the officer be guilty of the most reprehensible spying and window-peeping.⁵² It is immaterial that a flashlight or search-

expand to meet this expanded statutory meaning of "lawful arrest" is fully considered in Waite, *Public Policy and the Arrest of Felons* (1933) 31 MICH. L. REV. 749.

⁴⁷*Agnello v. United States*, 269 U. S. 20, 46 Sup. Ct. 4 (1925) (it is not enough that the officer have probable cause; a warrant is necessary); *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 40 Sup. Ct. 182 (1920) (place of business) (even though the papers could have been subpoenaed because the corporation could not claim privilege, the seizure was unlawful).

⁴⁸This expression is likewise found in the famous speech of James Otis in 1761, quoted in 2 WATSON, *THE CONSTITUTION* (1910) 1416, at 1418. It probably originated with Lord Coke. *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (1605).

⁴⁹Nevertheless, it has been judicially declared that a nudist camp in a clearing in the forest is *not* one's castle. *People v. Ring*, 267 Mich. 657, 255 N. W. 373 (1934). But compare *Chapin v. State*, 107 Tex. Cr. 477, 296 S. W. 1095 (1927) (tent held to be a dwelling house).

⁵⁰The protected area is defined as the house or place of business and those things immediately connected therewith (gardens, outhouses, and appurtenances necessary for the domestic comfort of the dwelling or place of business), sometimes called the "curtilage". *Worth v. State*, 111 Tex. Cr. 288, 12 S. W. (2d) 582 (1928).

⁵¹*Hester v. United States*, 265 U. S. 57, 44 Sup. Ct. 445 (1924) (open field); *United States v. McBride*, 287 Fed. 214 (S. D. Ala. 1922), *cert. den.*, 261 U. S. 614, 43 Sup. Ct. 359 (1923) (stable); *Guaresimo v. United States*, 13 F. (2d) 848 (C. C. A. 6th 1926) (garage and barns, not proved appurtenant to house); *Koth v. United States*, 16 F. (2d) 61 (C. C. A. 9th 1926) (still found quarter mile from house); *Dulek v. United States*, 16 F. (2d) 275 (C. C. A. 6th 1926) (cabin in swamp, not used as dwelling); *Schnorenberg v. United States*, 23 F. (2d) 38 (C. C. A. 7th 1927) (barn and chicken coop); *Brent v. Commonwealth*, 194 Ky. 504, 240 S. W. 45 (1922) (still in woods); *State v. Ladue*, 73 Mont. 535, 237 Pac. 495 (1925) (still in the open); *Eversole v. State*, 106 Tex. Cr. 567, 294 S. W. 210 (1927) (barn). But compare *People v. Lind*, 18 N. E. (2d) 189 (Ill. 1938) (hen-house); *People v. Brocamp*, 307 Ill. 448, 138 N. E. 728 (1923) (officers dug in passage-way under cottage).

⁵²*United States v. Lee*, 274 U. S. 559, 563, 47 Sup. Ct. 746 (1927) (examination of boat by searchlight before boarding it, revealing that smuggling was being committed, made the subsequent arrest and search proper); *Smith v. United States*, 2 F. (2d) 715 (C. C. A. 4th 1924) (flashlight turned on rear floor of parked automobile); *Cohn v. State*, 120 Tenn. 61, 109 S. W. 451 (1907) (officers removed brick in saloon wall and looked through); *Hunter v. State*, 111 Tex. Cr. 252, 12 S. W. (2d) 581 (1929) (window-peeping by officer); *State v. Basil*, 126 Wash. 155, 217 Pac. 720 (1923) (window).

"The eye cannot by the law of England be guilty of a trespass." Lord Camden in *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (1765).

light is used, for there is no right in the privacy afforded by darkness.⁵³ Eavesdropping also is not a "search".⁵⁴

Likewise, the doctrine of the *Six Carpenters' Case*,⁵⁵ although it operates to make the officers civilly liable as trespassers *ab initio* when they enter a building under a valid search warrant and abuse their authority, does not have the effect of making the search and seizure unconstitutional.⁵⁶ The constitutional guaranty is not co-extensive with the definition of a civil trespass.

Automobiles and vessels may be searched without a warrant, provided the officer had probable cause.⁵⁷ For such vehicles are mobile and may be far away before a warrant can be obtained.⁵⁸

Sealed letters and sealed packages in the mail are as fully guarded from inspection, except as to their outward appearance, and are as fully protected as if retained in the sender's possession, and may be opened only pursuant to a proper warrant.⁵⁹

But the constitutional protection has been held not to extend to such intangible things as messages traveling on telegraph or telephone wires,⁶⁰ on the theory that there is no "search" or "seizure" but a simple use of the sense of hearing. Although there was a *physical* tapping of the wires, the Court refused to indulge in the fiction that a wire leading many miles from a home or office was a part of it. Wire-tapping might be made unlawful by statute, but it is not unconstitutional. It is a penal offense in many states, as is the revelation of information thereby discovered.⁶¹ When Congress

⁵³United States v. Lee, and Smith v. United States, *supra* note 52.

⁵⁴People v. Cotta, 49 Cal. 166 (1874); Commonwealth v. Everson, 123 Ky. 330, 96 S. W. 460 (1906) (the landlady at the keyhole); DeLore v. Smith, 67 Ore. 304, 136 Pac. 13 (1913) (party line); Hunter v. State, 111 Tex. Cr. 252, 12 S. W. (2d) 581 (1929) (officer listening at window).

⁵⁵8 Coke 146a, 77 Eng. Rep. 695 (1611).

⁵⁶McGuire v. United States, 273 U. S. 95, 47 Sup. Ct. 259 (1927) (liquor seized under *valid* search warrant; officers, by an "illegal and oppressive act", destroyed all except some samples; held that the fiction is only applied as a rule of civil liability, and it will not be extended to exclude the use of evidence by the Government; the opinion is most instructive as showing how the Court sometimes gags on its own rule, for everything said in this opinion could be applied to the rule as a whole!) The contrary had been held in United States v. Cooper, 295 Fed. 709 (D. Mass. 1924).

⁵⁷Carroll v. United States, 267 U. S. 132, 45 Sup. Ct. 280 (1925); People v. Schaub, 279 Mich. 457, 272 N. W. 867 (1937). It would be unreasonable to permit automobiles to be searched without probable cause, so such searches are unlawful. Gambino v. United States, 275 U. S. 310, 48 Sup. Ct. 137 (1927); Hughes v. State 145 Tenn. 544, 238 S. W. 588 (1922).

⁵⁸Because of the greater sanctity of persons and houses, the courts are unwilling to apply this reasoning to them, although persons and articles in houses may be just as mobile. Agnello v. United States, 269 U. S. 20, 46 Sup. Ct. 4 (1925).

⁵⁹*Ex parte* Jackson, 96 U. S. 727, 733 (1877).

⁶⁰Olmstead v. United States, 277 U. S. 438, 48 Sup. Ct. 564 (1928).

⁶¹*E.g.* N. Y. PENAL LAW § 1423(6). Since this is in the article on Malicious Mischief, it has generally been assumed not to apply to police officers, and it was so held in People v. Hebbard, 96 Misc. 617, 620, 162 N. Y. Supp. 80 (Sup. Ct. 1916). Cf. Wass v. Stephens, 128 N. Y. 123, 28 N. E. 21 (1891), construing another subdivision of the same section.

took over the regulation of wire communications in 1934, it adopted such a provision,⁶² which makes criminal, subject to severe penalties,⁶³ the interception of such communications by any person, including an officer.⁶⁴ No provision is made for warrants; it is unlawful under all circumstances. In New York, where wire-tapping by officers had formerly been unrestricted,⁶⁵ the 1938 Constitutional Convention adopted a provision requiring a court order to be obtained for tapping wires, the order to be granted upon showing reasonable cause to believe that evidence of crime may thus be obtained.⁶⁶ But there remains the anomaly that officers acting under a lawful state warrant will be committing a federal felony!⁶⁷

The constitutional provisions as to search and seizure are restrictions on the government, not on individuals, and hence trespasses by private individuals do not violate the Constitution, if not instigated or participated in by officers.⁶⁸ The Federal Bill of Rights does not apply to state governments,⁶⁹ so state officers do not violate the Federal Constitution when they search,⁷⁰ unless they act in concert with federal authorities;⁷¹ nor do federal

⁶²Communications Act of 1934, § 605; 47 U. S. C. A. § 605 (Supp. 1938).

⁶³Maximum fine of \$10,000, imprisonment of two years, or both. 47 U. S. C. A. § 501 (Supp. 1938).

⁶⁴*Nardone v. United States*, 302 U. S. 379, 58 Sup. Ct. 275 (1937), *rev'g* 90 F. (2d) 630 (C. C. A. 2d 1937).

⁶⁵*Supra* note 61.

⁶⁶N. Y. CONST. (1938) Art. I, § 12. Contrast the fact that search warrants may not be issued solely for the purpose of getting evidence, *supra* note 43.

⁶⁷Whether this clause of the federal act applies only to interstate communications is still in dispute. But since it is not the nature of the wire but that of the communication that is material, an officer would in any case risk tapping into a communication with someone outside the state. Prosecution would be doubtful, however.

⁶⁸*Burdeau v. McDowell*, 256 U. S. 465, 41 Sup. Ct. 574 (1921) (employer broke into desk and safe and seized papers for purpose of prosecution); *Bacon v. United States*, 97 Fed. 35 (C. C. A. 8th 1899); *Imboden v. People*, 40 Colo. 142, 180, 90 Pac. 608, 619 (1907); *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085 (1891) (private detective); *Commonwealth v. Everson*, 123 Ky. 330, 96 S. W. 460 (1906) (landlady); *State v. Mathers*, 64 Vt. 101, 23 Atl. 590 (1892) (letter taken from pocket by daughter); *Barrett v. Fish*, 72 Vt. 18, 47 Atl. 174 (1899) (letters between petitioner and co-adulterer given to agent to be burned; agent, in breach of faith, gave letters to prosecutor); *Ware v. State*, 201 Wis. 425, 230 N. W. 80 (1930) (husband stole wife's diary, used in prosecution for adultery). The statutory provision against wire-tapping, however, applies to all persons, 47 U. S. C. A. § 605 (Supp. 1938).

⁶⁹*Barron v. Baltimore*, 7 Peters 243 (U. S. 1833). The "due process" and "privileges and immunities" clauses of the Fourteenth Amendment do not incorporate all of these rights, as restrictions on the states. *Walker v. Sauvinet*, 92 U. S. 90 (1875) (trial by jury); *Twining v. New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14 (1908) (self-incrimination).

⁷⁰*Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341 (1914) (admitting evidence furnished by local officers). Cf. *Pederson v. United States*, 271 Fed. 187 (C. C. A. 2d 1921) (evidence seized by British officers).

⁷¹*Byars v. United States*, 273 U. S. 28, 47 Sup. Ct. 248 (1927) (search by local police who invited federal officer to join them; held that mere participation in a state search by a federal officer is not enough, unless he participates in his official capacity; but the courts will scrutinize such arrangements for indirect violations, and one was found here); *Gambino v. United States*, 275 U. S. 310, 48 Sup. Ct. 137 (1927) (state officers, not directed by federal authority but still enforcing the Federal Prohibition Law, of which there was no state counterpart; held to be a violation, since done solely on behalf of Federal Government, if it ratifies it by prosecuting); *Flagg v. United States*, 233 Fed.

officers violate state constitutions by anything *they* may do.⁷²

B. Admissibility of Illegally Obtained Evidence

When property is obtained by an unreasonable search and seizure, as here defined, may the evidence be used in court? The earliest known case is *Bishop Atterbury's Trial*,⁷³ in the House of Lords in 1723. Certain letters were taken from the defendant's person by violence,⁷⁴ while others were intercepted in the mails.⁷⁵ These letters were admitted without permitting inquiry as to the authority by which they were seized.

In America, the question was first raised by a dictum of the Massachusetts court in *Commonwealth v. Dana*,⁷⁶ in 1841. The court had held the seizure lawful, but it went on to say, "There is another conclusive answer," that even if it were illegally seized, the evidence was nevertheless admissible.⁷⁷ This half-page dictum became the basis of a rule that was, at one time or another, adopted by most of the states.⁷⁸ It was never questioned until the United States Supreme Court countered with an even more gratuitous dictum,⁷⁹ in *Boyd v. United States*,⁸⁰ in 1886.

The *Boyd* case, taking what was decided and not what was said, was probably correctly determined.⁸¹ Under *court order*, defendant produced certain papers. The Court held that the order violated the Fifth Amendment by compelling defendant to be a witness against himself, and that the evidence could not be used. But the Court went on and assimilated such compulsory

481 (C. C. A. 2d 1916) (local officers seized books and papers, taken at once to federal prosecutor; court indulged presumption that prosecutor had read the *Weeks* case not wisely but too well); *United States v. Welch*, 247 Fed. 239 (S. D. N. Y. 1917), *aff'd*, 267 Fed. 819 (C. C. A. 2d 1920), *cert. den.*, 254 U. S. 637, 41 Sup. Ct. 9 (1920) (steamship detective acting for customs officer in his temporary absence).

Where local officers are actually engaged in enforcing a state statute, and are not cooperating with federal authorities, there is no violation of the Federal Constitution and federal courts will admit the evidence. *Gowling v. United States*, 64 F. (2d) 796 (C. C. A. 6th 1933).

⁷²*State v. Gardner*, 77 Mont. 8, 249 Pac. 574 (1926) (seizure by federal officers without knowledge of state authorities; it was for a crime under both laws, so prosecuted in state court—the dual system comes in handy!).

⁷³16 Howell State Trials 323 (1723). The authority of this case is weakened by the fact that it was a bill of attainder, this procedure being adopted expressly to avoid another rule of evidence (requiring two witnesses for treason), so it should not be accepted too readily as establishing any rule of evidence. See pages 489 and 660 of the report.

⁷⁴*Id.* at 490-493.

⁷⁵*Id.* at 430, 433, 495-96, 629-30.

⁷⁶2 Metc. 329, 337 (Mass. 1841).

⁷⁷Citing two English *civil* cases where court records, obtained without a proper order, were admitted in evidence. *Jordan v. Lewis*, 14 East 305 note, 104 Eng. Rep. 618 (1740); *Legatt v. Tollervey*, 14 East 302, 104 Eng. Rep. 617 (1811).

⁷⁸The first square holding is in *State v. Flynn*, 36 N. H. 64 (1858).

⁷⁹It has been said, with some force, that two-thirds of our law stems originally from dicta.

⁸⁰116 U. S. 616, 6 Sup. Ct. 524 (1886). There was an earlier dictum, more directly in point, in *Ex parte Jackson*, 96 U. S. 727, 733 (1877).

⁸¹The contrary has been suggested by Edgerton, *The Incidence of Judicial Control Over Congress* (1937) 22 CORNELL L. Q. 299, 302.

production of papers to a search and seizure, both of which force evidence from a person. Seizure of evidence was thus declared to be equivalent to compelling a man to be a witness against himself. Two justices, concurring in result, were unable to stomach this line of reasoning, but they were snowed under.

The *Boyd* case caused some stir in the state courts, but most of them recognized it as dictum, and distinguished it in search cases.⁸² The Supreme Court itself was not fully prepared to follow its rule, for in *Adams v. New York*,⁸³ in 1904, it indicated that the self-incrimination provision had no application to search and seizure, and that violations of the latter guaranty would not be punished indirectly by excluding the evidence, drawing an analogy to the *Ker* and *Mahon* cases.⁸⁴ While later cases sought to distinguish it on several grounds,⁸⁵ the case contains strong language. It distinguishes the *Boyd* case, cites and quotes from every leading case for admissibility, and declares unequivocally for that rule.⁸⁶ A few courts, however, even after the *Adams* case, found the *Boyd* dictum "too good to be untrue",⁸⁷ and declared for the first time that if evidence was obtained in violation of the constitution, it could not be used in court.⁸⁸

It took a more definite pronouncement by the highest court than it had made in the *Boyd* case, to really fertilize the "seeds of a dangerous heresy" that the *Boyd* case had sown. And in 1914 came *Weeks v. United States*,⁸⁹ in answer to the defense lawyers' prayer. The Court suddenly discovered that it had admitted the evidence in the *Adams* case, not for the reasons indicated in the opinion, but because no motion for the return of the property and

⁸²See *Starchman v. State*, 62 Ark. 538, 36 S. W. 940 (1896); *People v. LeDoux*, 155 Cal. 535, 102 Pac. 517 (1909); *State v. Pomeroy*, 130 Mo. 489, 32 S. W. 1002 (1895); *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1021 (1894); and many others.

⁸³192 U. S. 585, 24 Sup. Ct. 372 (1904), *aff'g* *People v. Adams*, 176 N. Y. 351, 68 N. E. 636 (1903).

⁸⁴*Supra* notes 15 and 28.

⁸⁵That the seizure was (apparently) lawful, that no preliminary motion was made, and that it was a seizure by state officers (*supra* note 70). Only the first of these is even suggested in the opinion as a possible second ground of decision.

⁸⁶If this was dictum, at least the same cannot be said of the short but clear holding in *Hyde v. United States*, 225 U. S. 347, 380, 32 Sup. Ct. 793, 807 (1912), where evidence that certain letters used in evidence were obtained by officers "robbing the mails" was excluded as irrelevant. "We cannot see how proof of 'a greater crime . . . in robbing the mails' was relevant to a decision of the charge then under consideration."

⁸⁷*Hammock v. State*, 1 Ga. App. 126, 128, 58 S. E. 66, 67 (1907).

⁸⁸*Hammock v. State*, 1 Ga. App. 126, 58 S. E. 66 (1907) (distinguishing *Williams v. State*, 100 Ga. 511, 28 S. E. 624 [1897], which had also come after the *Boyd* case but had admitted the evidence, on the basis that a search of the person compels him to be a witness against himself, while a search of his premises does not!); *State v. Sheridan*, 121 Iowa 164, 96 N. W. 730 (1903); *State v. Slamon*, 73 Vt. 212, 50 Atl. 1097 (1901) (but the court refused to extend the rule to contraband: *State v. Krinski*, 78 Vt. 162, 62 Atl. 37 [1905]). It is noteworthy that not one of these three states now follows the federal rule. The *Hammock* case was repudiated in *Calhoun v. State*, 144 Ga. 679, 87 S. E. 893 (1916); the *Sheridan* case in *State v. Tonn*, 195 Iowa 94, 191 N. W. 530 (1923); the *Slamon* case in *State v. Stacy*, 104 Vt. 379, 401, 160 Atl. 257, 266 (1932).

⁸⁹232 U. S. 383, 34 Sup. Ct. 341 (1914).

the suppression of the evidence had been made before trial. Early cases and text-writers had made an unfortunate choice of language when they said that the court would not "stop the trial" to try a "collateral" issue. A collateral issue, properly, is one that has no bearing on the merits of the case, in short, one that is irrelevant. It is no less collateral when it is raised in advance of trial than when it is raised at any other time. But when the Court at last decided to read into the Constitution the requirement that the evidence be excluded, it seized on these words as the basis for distinguishing past holdings, and read into it also a rule of practice found in no constitution, in no statute,⁹⁰ and in no analogous rule of evidence! As to all other rules of evidence, courts universally stop the trial, exclude the jury if necessary, and determine the admissibility of the evidence—the confession of a prisoner, the qualifications of an expert or of a child witness, and a myriad others. If the court in the *Adams* case had really thought the evidence improper, it would have determined the facts on the trial and excluded the evidence. But Justice Day, who delivered the opinions in both cases, insisted that the lack of a preliminary motion was a distinguishing fact.

Then the parade began. The fervent rhetoric in the *Weeks* case influenced one court after another to follow the new rule, just as fast as defense lawyers discovered the magic formula whereby older cases might be distinguished. No matter how strong and how sweeping the language in the older cases, no matter how little they rested on an unwillingness to "stop the trial", courts found that this was the true basis of the older cases, and distinguished them.⁹¹ A rare few definitely overruled their former holdings,⁹² and others

⁹⁰Since 1917, there has been statutory sanction for this procedure. 40 STAT. 229, 18 U. S. C. A. § 626. But there was none at the time. It appears first to have been attempted in *United States v. Wilson*, 163 Fed. 338 (C. C. S. D. N. Y. 1908), where the practice was approved but the motion was denied on the ground that the evidence was admissible (following the *Adams* case). It was first successful in *United States v. Mills*, 185 Fed. 318 (C. C. S. D. N. Y. 1911), *app. dismissed sub nom.* *Wise v. Mills*, 220 U. S. 549, 31 Sup. Ct. 597 (1911), which followed the *Boyd* case, obscurely distinguishing the *Adams* case.

⁹¹The lack of a motion was given as the ground of distinguishing in *People v. Marxhausen*, 204 Mich. 559, 171 N. W. 557 (1919) (distinguishing *People v. Aldorfer*, 164 Mich. 676, 130 N. W. 351 [1911]); *State v. Owens*, 302 Mo. 348, 259 S. W. 100 (1924) (distinguishing *State v. Pomeroy*, 130 Mo. 489, 32 S. W. 1002 [1895]); *State ex rel. Thibodeau v. District Court*, 70 Mont. 202, 224 Pac. 866 (1924) (distinguishing *State v. Reed*, 53 Mont. 292, 163 Pac. 477 [1917]); *State v. McDaniel*, 115 Ore. 187, 231 Pac. 965 (1925) (distinguishing *State v. Ware*, 79 Ore. 367, 154 Pac. 905, 155 Pac. 364 [1916]); *State v. Gibbons*, 118 Wash. 171, 203 Pac. 390 (1922) (ignoring *State v. Royce*, 38 Wash. 111, 80 Pac. 268 [1905], but the cases are distinguishable on this ground). Other grounds for distinguishing cases were found in *People v. Brocamp*, 307 Ill. 448, 138 N. E. 728 (1923) (distinguishing a one-time leading case, *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085 [1891], and other cases, on the ground that the seizure was by a private detective); and in *Hughes v. State*, 145 Tenn. 544, 238 S. W. 588 (1922) (distinguishing *Cohn v. State*, 120 Tenn. 61, 109 S. W. 451 [1907] on the ground that there was no technical search when officers made a peep-hole in defendant's wall).

⁹²*State v. Arregui*, 44 Ida. 43, 254 Pac. 788 (1927) (overruling *State v. Anderson*, 31 Ida. 514, 174 Pac. 124 [1918], which was indistinguishable because a motion was

simply overlooked them.⁹³ At present, by decision or by statute, the federal rule is adopted in twenty-one states, in complete or modified form.⁹⁴ These states are concentrated in two principal areas, a solid belt from north to south throughout the Middle West (excluding only Alabama), and the north-

there made and denied); *Nicholas v. City of Cleveland*, 125 Ohio St. 474, 182 N. E. 26 (1932) (the latest convert, repudiating strong dicta in *Rosanski v. State*, 106 Ohio St. 442, 140 N. E. 370 [1922]); *Gore v. State*, 24 Okla. Cr. 394, 218 Pac. 545 (1923) (overruling *Silva v. State*, 6 Okla. Cr. 97, 116 Pac. 199 [1911]); *State v. Gooder*, 57 S. D. 619, 234 N. W. 610 (1931) (overruling *City of Sioux Falls v. Walser*, 45 S. D. 417, 187 N. W. 821 [1922]); *State v. Wills*, 91 W. Va. 659, 114 S. E. 261 (1922) (rejecting strong dicta in *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429 [1902] and *State v. Sutter*, 71 W. Va. 371, 76 S. E. 811 [1912]); completely ignoring the only square case, *State v. Douglas*, 20 W. Va. 770 [1882]).

⁹³*Tucker v. State*, 128 Miss. 211, 90 So. 845 (1922) (ignoring *Pringle v. State*, 108 Miss. 802, 67 So. 455 [1915]); *Town of Blacksburg v. Beam*, 104 S. C. 146, 88 S. E. 441 (1916) (citing no cases at all, overlooking *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1021 [1894]; the *Blacksburg* case was in turn overruled and admissibility restored in *State v. Prescott*, 125 S. C. 22, 117 S. E. 637 [1923]).

⁹⁴*United States v. Giovanetti*, 6 Alaska 454 (1921); *Gildrie v. State*, 94 Fla. 134, 113 So. 704 (1927); *State v. Arregui*, 44 Ida. 43, 254 Pac. 788 (1927); *People v. Castree*, 311 Ill. 392, 143 N. E. 112 (1924); *People v. Lind*, 18 N. E. (2d) 189 (Ill. 1938); *Callender v. State*, 193 Ind. 91, 136 N. E. 10, 138 N. E. 817 (1922); *Youman v. Commonwealth*, 189 Ky. 152, 224 S. W. 860 (1920); *People v. Marxhausen*, 204 Mich. 559, 171 N. W. 557 (1919); *Tucker v. State*, 128 Miss. 211, 90 So. 845 (1922); *State v. Owens*, 302 Mo. 348, 259 S. W. 100 (1924); *State ex rel. Thibodeau v. District Court*, 70 Mont. 202, 224 Pac. 866 (1924); *Nicholas v. City of Cleveland*, 125 Ohio St. 474, 182 N. E. 26 (1932); *Gore v. State*, 24 Okla. Cr. 394, 218 Pac. 545 (1923); *State v. McDaniel*, 115 Ore. 187, 231 Pac. 965 (1925); *State v. Gooder*, 57 S. D. 619, 234 N. W. 610 (1931); *Hughes v. State*, 145 Tenn. 544, 238 S. W. 588 (1922); *Odenthal v. State*, 106 Tex. Cr. 1, 290 S. W. 743 (1927) (under statute, CODE CRIM. PROC. [Vernon 1925] § 727a, changing the rule announced in *Welchek v. State*, 93 Tex. Cr. 271, 247 S. W. 524 [1922]); *State v. Gibbons*, 118 Wash. 171, 203 Pac. 390 (1922); *State v. Wills*, 91 W. Va. 659, 114 S. E. 261 (1922); *Hoyer v. State*, 180 Wis. 407, 193 N. W. 89 (1923); *State v. Peterson*, 27 Wyo. 185, 194 Pac. 342 (1920).

In North Carolina, an attempt was made to adopt the federal rule by statute in 1937 (N. C. CODE ANN. [Michie Supp. 1937] § 4530 [1]), but poor drafting immediately led to the anomalous result that evidence obtained under an illegal warrant is inadmissible, but evidence obtained *without* a warrant is still admitted. *State v. McGee*, 198 S. E. 616 (N. C. 1938).

In Maryland and Michigan, compromises have been adopted in the interest of public safety. In Maryland, where the evidence formerly was admissible. (*Lawrence v. State*, 103 Md. 17, 63 Atl. 96 [1906]), the Legislature was unwilling to go the whole route, and declared in 1929 that such evidence should be inadmissible in misdemeanor trials but admissible in felony cases. MD. ANN. CODE (Flack Supp. 1935) Art. 35, § 4A. Michigan had followed the rule of inadmissibility, which, resting on supposed constitutional grounds, could not be changed by statute. But crime conditions got sufficiently serious (see the study by Waite, *Public Policy and the Arrest of Felons* [1933] 31 MICH. L. REV. 749) that the Legislature proposed a constitutional amendment excepting dangerous weapons from this rule, if seized "outside the curtilage of any dwelling house". It was accepted by the voters in 1936, and will be found in Mich. Pub. Acts. 1937, p. 876.

Two attempts to write the federal rule into state constitutions have been defeated. A convention in Louisiana in 1921 rejected the rule (see *State v. Fleckinger*, 152 La. 337, 341, 93 So. 115, 116 [1922]), and the New York convention in 1938 did likewise after a long and bitter debate. A compromise similar to the Michigan amendment was proposed by Delegate Poletti (now Lieutenant Governor), but was also rejected. CONVENTION RECORD (N. Y. 1938) p. 617. The fight is now going on in the Legislature, and before this article appears, New York will probably be completely or partially in the federal camp, because a compromise has already been proposed by the admissibility adherents, which would reject evidence obtained by illegal wire-tapping, but not other illegally obtained evidence. N. Y. Times, Feb. 3, 1939, p. 1, col. 1.

west corner of the country. Outside of these two areas, there are only three concurring states in the Southwest and three on the South Atlantic seaboard (two of the latter having statutes in restricted form). The rule of admissibility is followed in the remaining twenty-seven states (three of them by dictum),⁹⁵ and in three of the federal rule states the evidence is admissible in certain cases.⁹⁶ The evidence is admitted in England⁹⁷ and Canada,⁹⁸ on common law principles.

⁹⁵In some of these states, the question of whether the evidence will be excluded on preliminary motion has never been raised, and the cases are still subject to be distinguished on this ground. But the courts in most of these states have reviewed their prior decisions with the federal rule before them and have not rested their decisions on so narrow a ground. The cases in which a motion has been made and denied are starred; in these states the question appears closed. Where possible, a leading early case has been supported by a later case reviewing the question after the *Weeks* decision. The cases admitting illegally seized evidence are: *Shields v. State*, 104 Ala. 35, 16 So. 85 (1893); *Banks v. State*, 207 Ala. 179, 93 So. 293 (1921), *cert. den.*, 260 U. S. 736, 43 Sup. Ct. 96 (1922); *Argetakis v. State*, 24 Ariz. 599, 212 Pac. 372 (1923) (dictum); *Starchman v. State*, 62 Ark. 538, 36 S. W. 940 (1896); *Venable v. State*, 156 Ark. 564, 246 S. W. 860 (1923); *People v. LeDoux*, 155 Cal. 535, 102 Pac. 517 (1909); *People v. Mayen*, 188 Cal. 237, 205 Pac. 435 (1922); *Massantonio v. People*, 77 Colo. 392, 236 Pac. 1019 (1925); *State v. Reynolds*, 101 Conn. 224, 125 Atl. 636 (1924) (dictum, but thorough discussion); *State v. Chuchola*, 32 Del. 133, 120 Atl. 212 (Ct. Gen. Sess. 1922); *Williams v. State*, 100 Ga. 511, 28 S. E. 624 (1897); *Herndon v. State*, 178 Ga. 832, 174 S. E. 597 (1934); *Territory v. Soga*, 20 Hawaii 71 (1910); *State v. Tonn*, 195 Iowa 94, 191 N. W. 530 (1923); *State v. Miller*, 63 Kan. 62, 64 Pac. 1033 (1901); *State v. Johnson*, 116 Kan. 58, 226 Pac. 245 (1924); *State v. Fleckinger*, 152 La. 337, 93 So. 115 (1922); *State v. Burroughs*, 72 Me. 479 (1881); *Commonwealth v. Tibbetts*, 157 Mass. 519, 32 N. E. 910 (1893); *Commonwealth v. Wilkins*, 243 Mass. 356, 138 N. E. 11 (1923); *State v. Hesse*, 154 Minn. 89, 191 N. W. 267 (1922); *Georgis v. State*, 110 Neb. 352, 193 N. W. 713 (1923); *State v. Chin Gim*, 47 Nev. 431, 224 Pac. 798 (1924); *State v. Flynn*, 36 N. H. 64 (1858); *State v. Agalos*, 79 N. H. 241, 107 Atl. 314 (1919) (dictum); *State v. Lyons*, 99 N. J. L. 301, 122 Atl. 758 (1923); *State v. First Criminal Judicial District*, 10 N. J. Misc. 715, 160 Atl. 672 (Sup. Ct. 1932); *State v. Dillon*, 34 N. M. 366, 281 Pac. 474, 88 A. L. R. 340 (1929); *People v. Adams*, 176 N. Y. 351, 68 N. E. 636 (1903), *aff'd sub nom. Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372 (1904); *People v. Defore*, 242 N. Y. 13, 150 N. E. 585 (1926), *cert. den.*, 270 U. S. 657, 46 Sup. Ct. 353 (1926); *State v. Fahn*, 53 N. D. 203, 205 N. W. 67 (1925); *Commonwealth v. Dabbierio*, 290 Pa. 174, 138 Atl. 679 (1927) (this report does not say whether there was a pre-trial motion, but the report below in 89 Pa. Super. Ct. 435 [1926] reveals that a motion was duly made and denied); *State v. Chester*, 46 R. I. 485, 129 Atl. 596 (1925) (dictum); *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1021 (1894); *State v. Prescott*, 125 S. C. 22, 117 S. E. 637 (1923); *State v. Aime*, 62 Utah 476, 220 Pac. 704 (1923); *State v. Krinski*, 78 Vt. 162, 62 Atl. 37 (1905); *State v. Stacy*, 104 Vt. 379, 160 Atl. 257 (1932); *Lucchesi v. Commonwealth*, 122 Va. 872, 94 S. E. 925 (1918) (dictum); *Hall v. Commonwealth*, 138 Va. 727, 121 S. E. 154 (1924).

This rule is ably defended by Prof. Wigmore in 4 EVIDENCE (2d ed. 1923) §§ 2183, 2184. Whereas the legislature is empowered to abandon or modify this rule by statute, it is impossible to *adopt* this rule by statute when the courts have followed the federal rule. It was attempted in Mississippi (L. 1924, c. 244, § 3, relating only to Prohibition cases), but the statute was declared unconstitutional. *Orick v. State*, 140 Miss. 184, 105 So. 465 (1925).

⁹⁶Maryland, Michigan, North Carolina. *Supra* note 94.

⁹⁷*Bishop Atterbury's Trial*, 16 How. St. Tr. 323 (H. L. 1723); *Regina v. Granatelli*, 7 St. Tr. (N. S.) 979, 987 (Cent. Crim. Ct. 1849). No later cases have been found, but it is stated to be the law of England as recently as (1922) 86 JUST. P. 173.

⁹⁸*Rex v. Moore*, 17 Alta. 503, 63 Dom. L. R. 472 (App. Div. 1922); *Regina v. Doyle*, 12 Ont. Rep. 347 (1886); *Rex v. Honan*, 26 Ont. L. R. 484, 6 Dom. L. R. 276 (C. A.

The fact that the federal rule grew up by a process of distinguishing former cases has saddled the rule with a court-made rule of practice that it has not yet shaken off. If, as these courts maintain, the Constitution forbids the use of evidence obtained in violation of its provisions, it surely should have been treated like other rules of evidence with a less sanctified origin, with objection permitted on the trial, and there is no constitutional authority permitting a court to impose restrictions not clearly implied in the implied provision of the Constitution.⁹⁹ A few courts, lacking or sweeping aside contrary precedents, recognized this argument and declared that this rule shall be treated like any other rule of evidence, with objection to be raised on trial.¹⁰⁰ So far as there is any justification for the rule of exclusion, this seems the preferable view.¹⁰¹

But other courts, loath to dispense with earlier precedents, have retained the above requirement and will admit the evidence if no preliminary motion is made.¹⁰² It has been assumed by many courts and writers that the

1912); *Rex v. Hawkins*, 35 Que. K. B. 96 (1923); *Rex v. Gilchrist*, [1936] 3 Dom. L. R. 238 (Sask. K. B.).

By a curious inversion of the federal rule, the Canadian courts will admit the evidence but deny a forfeiture. *Rex v. Moore*, *supra*; *Ex parte Kavanaugh*, 2 Can. C. C. 267 (N. B. 1896). Cf. *Dodge v. United States*, 272 U. S. 530, 47 Sup. Ct. 191 (1926), and see *supra* note 24.

⁹⁹It is surely heaping fiction on fiction to read in both the bar of the evidence and the unusual procedural restriction on this implied bar!

¹⁰⁰*Kentucky*: No motion required. *Youman v. Commonwealth*, 189 Ky. 152, 224 S. W. 860 (1920). A motion before trial is properly overruled, for the issue can *only* be raised on the trial. *Commonwealth v. Meiner*, 196 Ky. 840, 245 S. W. 890 (1922). A motion to strike out, at the close of all the evidence, is timely although no objection had been made. *Wathen v. Commonwealth*, 211 Ky. 586, 277 S. W. 839 (1925).

Maryland: No motion required, under statute. *Gorman v. State*, 161 Md. 700, 158 Atl. 903 (1932).

Mississippi: Irrespective of motion, no seized evidence can be admitted on the trial without showing a warrant or justifying the lack of one. *King v. State*, 147 Miss. 31, 113 So. 173 (1927). But objection must be made to the offer of the evidence, not after it has come in. *McNutt v. State*, 143 Miss. 347, 108 So. 721 (1926).

North Carolina: No motion specified in statute. N. C. CODE ANN. (Michie Supp. 1937) § 4530(1).

Oklahoma: No motion required. *Gore v. State*, 24 Okla. Cr. 394, 218 Pac. 545 (1923). But defendant must "object at the first opportunity". *Webb v. State*, 33 Okla. Cr. 77, 242 Pac. 784 (1926) (failed to object to offer of evidence; this language does not impose the requirement of a motion). A motion is sanctioned, however. *Committi v. State*, 28 Okla. Cr. 380, 231 Pac. 316 (1924).

Tennessee: No motion required. *State v. Bass*, 153 Tenn. 162, 281 S. W. 936 (1926).

Texas: Under statute, no motion required. *Odenthal v. State*, 106 Tex. Cr. 1, 290 S. W. 743 (1927). Nor is it permitted. *Gentry v. State*, 105 Tex. Cr. 385, 288 S. W. 213 (1926).

West Virginia: No motion required. *State v. Wills*, 91 W. Va. 659, 114 S. E. 261 (1922).

¹⁰¹One sound reason for the requirement, however—though it would apply equally to many rules of pleading and evidence in which it is *not* applied,—is that it prevents surprise of the prosecutor, who may not know of the illegality of the seizure. *Atkinson, Prohibition and the Weeks case* (1925) 23 MICH. L. REV. 748, 751.

¹⁰²*State v. Wansgaard*, 46 Ida. 20, 265 Pac. 671 (1928) (motion after jury impaneled is too late; cf. *State v. Arregui*, 44 Ida. 43, 254 Pac. 788 [1927], motion after plea but before jury impaneled held timely); *People v. Winn*, 324 Ill. 428, 155 N. E. 337 (1927); *McSwain v. State*, 89 Ind. App. 592, 166 N. E. 444, 167 N. E. 568 (1929)

federal courts had abandoned the requirement,¹⁰³ because of the language used in and the results of a series of leading cases that followed the *Weeks* case.¹⁰⁴ But later federal cases, following a significant dictum in *Seguro v. United States*,¹⁰⁵ have held that the requirement of a motion is still maintained, although subject to undefined "exceptions".¹⁰⁶ Analyzing the cases in which it has been held unnecessary, it is difficult to be sure whether the rule rests on waiver or on trial convenience. In *Gouled v. United States*,¹⁰⁷ defendant had no knowledge before the trial that the particular evidence had been illegally seized. In *Amos v. United States*¹⁰⁸ and *Agnello v. United States*,¹⁰⁹ the fact of illegal seizure was not in controversy but was brought out on cross-examination of the witness who offered the evidence. It is probable that in the courts which recognize the latter exception, there is no question of waiver by failure

(but cf. an earlier case in a higher court, where no mention is made of a motion having been made yet the evidence was excluded. *Callender v. State*, 193 Ind. 91, 136 N. E. 10, 138 N. E. 817 [1922]); *People v. Vulje*, 223 Mich. 656, 194 N. W. 582 (1923) (motion after impaneling of jury had begun, too late); *People v. Boyd*, 228 Mich. 57, 199 N. W. 662 (1924) (notice of motion served two days before trial date; rules required four days notice, and the evidence was given before the motion could be heard; admissible) (but cf. *People v. Van Vorce*, 240 Mich. 75, 215 N. W. 5 [1927], in which the notice was served before trial but the case was pushed to trial too soon; held, the court's refusal to grant a continuance or shorten the time of notice was an abuse of discretion); *State v. Wagner*, 311 Mo. 391, 279 S. W. 23 (1926); *State v. Gotta*, 71 Mont. 288, 229 Pac. 405 (1924); *Ciano v. State*, 105 Ohio St. 229, 137 N. E. 10 (1922) (this case preceded the express adoption of the rule in Ohio, but it contains dicta indicating that the court already inclined that way); *State v. Harris*, 119 Ore. 422, 249 Pac. 1046 (1926); *United States v. Cerecedo*, 6 Porto Rico Fed. 607 (1914); *State v. Dersiy*, 121 Wash. 455, 209 Pac. 837 (1922) (motion immediately after calling of case for trial, before jury impaneled, too late).

The making of an unsuccessful motion before trial does not relieve of the need to object at the trial. *Robertson v. State*, 94 Fla. 770, 114 So. 534 (1927). *Contra*: *Giles v. United States*, 284 Fed. 208 (C. C. A. 1st 1922) (but cf. *Seguro v. United States*, 275 U. S. 106, 48 Sup. Ct. 77 [1927]).

¹⁰³The lower federal courts were in confusion on this question. Motion required: *Youngblood v. United States*, 266 Fed. 795 (C. C. A. 8th 1920); *Wiggins v. United States*, 272 Fed. 41 (C. C. A. 2d 1921); *Armstrong v. United States*, 16 F. (2d) 62 (C. C. A. 9th 1926), *cert. den.*, 273 U. S. 766, 47 Sup. Ct. 571 (1927). No motion required: *Ganci v. United States*, 287 Fed. 60 (C. C. A. 2d 1923) (even though no objection to evidence, motion to strike timely at any time before verdict); *Rizzo v. United States*, 275 Fed. 49 (C. C. A. 4th 1921) (no objection or motion to strike; held properly raised by motion for directed verdict).

¹⁰⁴*Gouled v. United States*, 255 U. S. 298, 41 Sup. Ct. 261 (1921); *Amos v. United States*, 255 U. S. 313, 41 Sup. Ct. 266 (1921); *Agnello v. United States*, 269 U. S. 20, 46 Sup. Ct. 4 (1925). In none of these cases was a preliminary motion made, and in the *Gouled* case, at p. 313, the Court said, "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."

¹⁰⁵275 U. S. 106, 112, 48 Sup. Ct. 77, 79-80 (1927). In this case, there was no objection on the trial, so it is not too strong an authority for the necessity of raising it before trial, but there is a dictum to that effect, citing the *Adams* case, *supra* note 83. The dictum is quoted in *Cogen v. United States*, 278 U. S. 221, 223, 49 Sup. Ct. 118 (1929).

¹⁰⁶*Rocchia v. United States*, 78 F. (2d) 966 (C. C. A. 9th 1935); *Peters v. United States*, 97 F. (2d) 500 (C. C. A. 9th 1938).

¹⁰⁷*Supra* note 104. In *People v. Bass*, 235 Mich. 588, 209 N. W. 926 (1926), where defendant knew of the seizure but his attorney did not, the court denied objection on the trial, saying it was defendant's duty to tell his attorney.

¹⁰⁸*Supra* note 104.

¹⁰⁹*Supra* note 104.

to move, but if that is the case, the defendant's rights are made to hang on the district attorney's decision to make an issue of it; if the officer denies the key facts (for example, probable cause for obtaining the warrant), the court will not determine the issue. It becomes, then, purely a question of trial convenience, which will be waived when there was no opportunity to raise the issue before trial and will be inapplicable where the facts are undisputed or where the illegality appears upon the face of the warrant or affidavits so that a pure question of law is presented.¹¹⁰

The motion which is customarily made is not merely for the return of the evidence but also for the suppression of all oral evidence of what the officers saw in the course of the unlawful search.¹¹¹ Furthermore, the officers can make no use *whatever* of the knowledge gained by the illegal search. In *Silverthorne Lumber Company v. United States*,¹¹² officers seized the books of a corporation. They were returned on motion. Thereupon, since corporations cannot assert the privilege against self-incrimination,¹¹³ the books were subpoenaed. The case came up on contempt for disobeying the subpoena, and it was held that the government could not use its tainted knowledge even to found a regular and legal proceeding. Presumably, therefore, a new search warrant likewise could not be founded upon "probable cause" derived from such knowledge. In the *Gouled* case,¹¹⁴ a contention was made but not expressly passed on (the Court deciding generally for the defendant) that certain duplicate originals of a seized contract, lawfully obtained from the other party to the contract, should be suppressed on the ground that its existence was inferred as a result of discovering the original unlawfully. Nevertheless, the information does not become sacred and inaccessible, but the officers must put the search out of mind and hustle around for inde-

¹¹⁰The rules are thus stated in *Robertson v. State*, 94 Fla. 770, 114 So. 534 (1927); *State v. Dersiy*, on rehearing, 121 Wash. 455, 461, 215 Pac. 34 (1923); *State v. Warfield*, 184 Wis. 56, 198 N. W. 854 (1924) (applying the second rule).

In any event, it is discretionary with the trial court, if a motion is made, to withhold consideration until the facts are developed on the trial. *Panzich v. United States*, 285 Fed. 871 (C. C. A. 9th 1922).

¹¹¹*United States v. Kraus*, 270 Fed. 578 (S. D. N. Y. 1921); *Flagg v. United States*, 233 Fed. 481 (C. C. A. 2d 1916); *Carignano v. State*, 31 Okla. Cr. 228, 238 Pac. 507 (1925) (no motion there required, but excluded oral evidence). Where the property is possessed by revenue officers, not officers of the court and not acting pursuant to judicial process, they cannot be bound by a motion to return, but an independent proceeding must be brought to regain the property; but a motion to suppress the evidence would be proper. *United States v. Hee*, 219 Fed. 1019 (D. N. J. 1915).

Where the property seized is contraband, its possession being unlawful, it is subject to forfeiture (see *supra* note 24), so a motion to suppress or destroy the evidence would be made. See *infra* note 137. And see full discussion in *United States v. Goodhues*, 53 F. (2d) 696 (D. Md. 1931).

¹¹²251 U. S. 385, 40 Sup. Ct. 182 (1920).

¹¹³*Hale v. Henkel*, 201 U. S. 43, 74, 26 Sup. Ct. 370, 378 (1906); *Essgee Co. of China v. United States*, 262 U. S. 151, 43 Sup. Ct. 514 (1923).

¹¹⁴*Supra* note 104.

pendent sources of the same information, in no way traceable to their prior misdeeds.¹¹⁵

The rule of exclusion, as manifested in the federal and state courts, is honeycombed with exceptions, some resulting from the limitations of the constitutional guaranty, as heretofore outlined, and some from an attempt to distinguish prior cases (admitting the evidence) by confining them to their facts. The most important exceptions result from the fact that the rule itself is regarded as an exception to the general rule that illegality in obtaining evidence does not operate to exclude it unless some constitutional right has been violated.¹¹⁶ Hence it is universally agreed¹¹⁷ that evidence is not to be excluded because obtained by the wrong of a private individual.¹¹⁸ It is also agreed that evidence wrongfully obtained by officers of a different government than that conducting the prosecution might be admitted without violating the constitution,¹¹⁹ provided there was no collusion between such officers and those of the prosecuting government;¹²⁰ but, irrespective of the constitutional question, a number of courts and one legislature have doubted the propriety of accepting such evidence from other officers as a matter of public policy.¹²¹ This exception has been subjected to a great deal of criticism, particularly by judges holding the contrary view who utilize the familiar device of *reductio ad absurdum*.¹²² The exception has probably

¹¹⁵The procedure on a motion in such a case was outlined by Judge Learned Hand in *United States v. Kraus*, 270 Fed. 578 (S. D. N. Y. 1921): the order of the court provides that *all information contained* in the seized papers, shall be suppressed, unless the officers can show that they learned it independently of their wrongful possession of the papers; this issue is settled by reference to a master, to whom proof of independent information is presented.

For an example of evidence subsequently obtained as a result of knowledge from sources independent of the prior seizure, see *Safarik v. United States*, 62 F. (2d) 892 (C. C. A. 8th 1933).

¹¹⁶Fraenkel, *Recent Developments in the Law of Search and Seizure* (1920) 13 MINN. L. REV. 1, 13, submits that *all* illegally obtained evidence should now be excluded, since what he considers the sole reason for the common law rule, the desire to avoid collateral issues on the trial, has been eliminated by the invention of the motion. But it is the thesis of this article that there are more important reasons than this for the rule of admissibility and that few if any of the leading cases that established that rule ever went off on this ground. It became merely a convenient peg on which to hang a new rule when a court changed its mind.

But, irrespective of reasons, Fraenkel is not without support in high places. See dissent of Justices Brandeis and Holmes in *Burdeau v. McDowell*, 256 U. S. 465, 476, 41 Sup. Ct. 574 (1921) (private individual seized papers).

¹¹⁷Brandeis and Holmes dissenting. See *supra* note 116.

¹¹⁸Cases cited *supra* note 68.

¹¹⁹*Supra* notes 70 and 72.

¹²⁰*Supra* note 71.

¹²¹Evidence of federal officers *rejected* in state courts: *State v. Arregui*, 44 Ida. 43, 254 Pac. 788 (1927); *Wathen v. Commonwealth*, 211 Ky. 586, 277 S. W. 839 (1925) (without discussion of the point); *Ramirez v. State*, 123 Tex. Cr. 254, 58 S. W. (2d) 829 (1933) (under statute expressly excluding evidence obtained by an officer or other person in violation of the constitution or laws of Texas or the Federal Constitution, a provision which would seem broad enough to exclude the results even of private trespasses, although no case in point has been found. TEX. CODE CRIM. PROC. [Vernon 1925] § 727a). *Contra*: *State v. Gardner*, 77 Mont. 8, 249 Pac. 574 (1926).

¹²²In *People v. Defore*, 242 N. Y. 13, 22, 150 N. E. 585, 588 (1926), Judge Cardozo

been overemphasized, for the courts have been astute to discover collusion.

There is another exception of major importance, although it has never come squarely before the Supreme Court. It is uniformly held that a defendant cannot object to the seizure of another's property, for no constitutional right of the *defendant* has been violated.¹²³ The immunity from search and seizure is a personal one. The third party whose property was seized may move for its return,¹²⁴ but he may not have oral evidence concerning it suppressed except as against himself.¹²⁵ A proprietary or possessory interest in either the premises searched or the things seized would appear to be sufficient,¹²⁶ although there are cases in the circuit courts of appeals that suggest that if the defendant's own property is searched but articles belonging to another are seized, the defendant can make no complaint. These cases seem of doubtful validity, however, for *his* constitutional rights were violated by the search of his property, and *whatever* was found was a direct result of this violation.¹²⁷ The owner of property leased to another

attacks the federal rule as "either too strict or too lax", for the prosecutor who, in using the results of his own officers' wrongs, is said to ratify the means, need not be so scrupulous about evidence brought to him by others. "We exalt form above substance when we hold that the use is made lawful because the intruder is without a badge of office."

In *State v. Fahn*, 53 N. D. 203, 210, 205 N. W. 67, 70 (1925), it is said that the result of the federal rule is that if one enters a house with felonious intent, the evidence of what he saw and took away is admitted; but if he enter as an officer, his eyes, ears, and lips are sealed.

The vitriolic dissenter in *State v. Gooder*, 57 S. D. 619, 633, 234 N. W. 610, 616 (1930), regards it as a "mystic and incomprehensible honor that accepts and shares the dishonorable conduct of faithless and disobedient officers of the particular jurisdiction in which the case is to be tried, but which honor refuses to be sullied by the unlawful acts of citizens or officers of another jurisdiction."

¹²³*Tsue Shee v. Backus*, 243 Fed. 551 (C. C. A. 9th 1917); *Connolly v. Medalie*, 58 F. (2d) 629 (C. C. A. 2d 1932), citing cases from every circuit except the first.

¹²⁴*United States v. Spallino*, 21 F. (2d) 567 (W. D. N. Y. 1927).

¹²⁵*In re Dooley*, 48 F. (2d) 121 (C. C. A. 2d 1931). The court leaves open the question whether the evidence might, after return, be subpoenaed for use against the other defendants; since the process is directed against the one wronged, even though the evidence is not to be used against him, a subpoena might be denied if based on knowledge gained by the search. Cf. *Silverthorne Lumber Co. v. United States*, *supra* note 112.

¹²⁶*Gilliland v. Commonwealth*, 224 Ky. 453, 6 S. W. (2d) 467 (1928). See *Safarik v. United States*, 62 F. (2d) 892, 895 (C. C. A. 8th 1933) (stating that, to raise the issue, defendant must own, lease, control, occupy, possess, or have an interest in the property).

Apparently the sender and recipient of telegrams have sufficient interest in the copies filed with the telegraph company to object to their unlawful seizure. See *Hearst v. Black*, 66 App. D. C. 313, 87 F. (2d) 68 (1936) (the court denied relief on the special grounds that it could not control the Senate Committee, and that the Communications Commission contemplated no further seizures and had turned over the spoils to the Senators). But such telegrams are subject to subpoena for a proper purpose, since such process is not directed against a party and does not compel him to give evidence. *Newfield v. Ryan*, 91 F. (2d) 700 (C. C. A. 5th 1937), *cert. den.*, 302 U. S. 729, 58 Sup. Ct. 54 (1937); *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831 (1891); cf. *McMann v. Securities and Exchange Comm.*, 87 F. (2d) 377 (C. C. A. 2d 1937), *cert. den.*, 301 U. S. 684, 57 Sup. Ct. 785 (1937) (defendant's brokerage account may be subpoenaed).

¹²⁷*Hurwitz v. United States*, 299 Fed. 449 (C. C. A. 8th 1924) (narcotics illegally seized in defendant's car; since two of the bottles had been previously sold to a third party, they were admitted in evidence with the admonition to the jury that they

cannot complain of a search, for he has no right to possession.¹²⁸ A lessee or other lawful occupant, has a sufficient interest to raise the issue.¹²⁹ But one having merely the custody of the property as an employee is not protected;¹³⁰ the evidence may be used against the workman at the still, but the head bootlegger must be protected in his constitutional right of privacy. There is some doubt as to the *officers* of a corporation. In the *Silverthorne* case,¹³¹ corporate officers were protected against unlawful seizure and use of corporate papers, which raises some doubt as to whether the Supreme Court, if squarely presented with the question, would not repudiate the whole third party exception. However, the lower courts have regularly applied the exception, and have refused protection even to officers of corporations and associations,¹³² distinguishing the *Silverthorne* case if it was raised at all.¹³³ If the defendant disclaims ownership or possession of the property, he has no standing to demand its return or suppression;¹³⁴ but

should disregard them unless they found an executed sale had been consummated!); *Lewis v. United States*, 92 F. (2d) 952 (C. C. A. 10th 1937) (memorandum book of prostitute taken from white slaver's baggage, held admissible because not his property); *State v. Goldstein*, 111 Ore. 221, 224 Pac. 1087 (1924) (stolen goods taken from defendant's shop, held admissible). *Contra*: *People v. Galnt*, 235 Mich. 646, 209 N. W. 915 (1926) (possessor of liquor in his own dwelling may suppress evidence although he does not own the liquor).

Would it be amiss to suggest that courts shrink from their vaunted "liberal" interpretation of the Bill of Rights when confronted with a drug peddler, a white slaver, or a thief, instead of a Prohibition or revenue violator?

¹²⁸*Hardwig v. United States*, 23 F. (2d) 992 (C. C. A. 6th 1928). The fact that the trespassing officers passed through parts of the premises occupied by defendant is immaterial if the search and seizure occurred in leased portions. *United States v. Muscarelle*, 63 F. (2d) 806 (C. C. A. 2d) (1933).

¹²⁹*Alvau v. United States*, 33 F. (2d) 467 (C. C. A. 9th 1929) (one actually domiciled in residence, as a guest or employee, may claim protection); *Gilliland v. Commonwealth*, 224 Ky. 453, 6 S. W. (2d) 467 (1928) (lessee). But a trespasser, using an abandoned farm building as a still and as a residence, is not protected. *Stakich v. United States*, 24 F. (2d) 701 (C. C. A. 9th 1928) (as trespassers, their *possessio pedis* was protected to the extent of *actual* occupancy—the building itself—but by the time the officers got that close they *saw* the crime in process, and made a lawful arrest and search).

¹³⁰*Connolly v. Medalie*, 58 F. (2d) 629 (C. C. A. 2d 1932) (watchman and workers at still); *Whitcombe v. United States*, 90 F. (2d) 290 (C. C. A. 3rd 1937) (driver of liquor truck and workers).

¹³¹251 U. S. 385, 40 Sup. Ct. 182 (1920).

¹³²*Haywood v. United States*, 268 Fed. 795 (C. C. A. 7th 1920), *cert. den.*, 256 U. S. 689, 41 Sup. Ct. 449 (1921) (voluntary association regarded as entity distinct from its members for all purposes except contract liability, so its officers could not assert its constitutional immunity from search); *Newingham v. United States*, 4 F. (2d) 490 (C. C. A. 3rd 1925) (officers and sole owners of corporation not protected).

¹³³The *Haywood* case, *supra* note 132, refers to the *Silverthorne* case and says that if "proper parties"—presumably the same officers in their capacity as such, instead of as individuals—had applied, the evidence would have been returned and no subpoena could have been enforced (unless founded on independent knowledge). In the *Dooley* case, *supra* note 125, the court distinguishes the *Silverthorne* case by treating corporate officers as *sui generis*, sharing the immunity of their corporation on grounds of policy, for there would be little to discourage the police from illegal raids on corporations if all they lost was the corporation's fine, its officers still being punishable.

¹³⁴*Gowling v. United States*, 64 F. (2d) 796 (1933); and the same is implicit in the cases cited *supra* notes 123 *et seq.*

if he alleges ownership or possession in affidavits on the motion, these damaging admissions, having resulted wholly from the exigency of the unlawful search, are excluded from evidence.¹³⁵

Somewhat related to this exception is another one once clearly the rule in a few courts and frequently recognized by dicta during the "growing pains" of the federal rule, by courts hesitant to accept its full implications. This rule is that illegally seized evidence is excluded unless it is contraband or is "*the corpus delicti*".¹³⁶ Under this rule, evidence unlawfully seized could be used if it was stolen property, property the possession of which was unlawful, or forfeitable property, on the same theory that property belonging to a third party could be used, since forfeiture of contraband property occurs automatically upon the commission of the forbidden act, the later judicial declaration of forfeiture relating back to that time, and it was regarded as a seizure of *government* property.¹³⁷ But, except in Vermont and some lower federal courts, no jurisdiction has ever produced two decisions, one holding contraband admissible and the other holding non-contraband inadmissible, and those jurisdictions, moving in opposite directions, have since repudiated the distinction. Therefore, while some dicta remain to haunt a few courts, it may be said that the contraband exception is virtually a dead

¹³⁵*Safarik v. United States*, 62 F. (2d) 892 (C. C. A. 8th 1933). *Contra*: *Vaught v. United States*, 7 F. (2d) 370 (C. C. A. 9th 1925) (without discussion).

¹³⁶*United States v. Welch*, 247 Fed. 239 (S. D. N. Y. 1917), *aff'd*, 267 Fed. 819 (C. C. A. 2d 1920), *cert. den.*, 254 U. S. 637, 41 Sup. Ct. 9 (1920) (letter used in aiding the enemy, held to be the *corpus delicti* so admissible); *United States v. Fenton*, 268 Fed. 221 (D. Mont. 1920) (liquor and automobile seized; as they were forfeitable, held to be a seizure of *government's* property, of which defendant cannot complain); *Pasch v. People*, 72 Colo. 92, 209 Pac. 639 (1922) (liquor; court rests it on basis of contraband, but in a later liquor case the court unequivocally adopted the rule of complete admissibility. *Massantonio v. People*, 77 Colo. 392, 236 Pac. 1019 [1925]); *State v. Chuchola*, 32 Del. 133, 120 Atl. 212 (Ct. Gen. Sess. 1922) (liquor case, held admissible; "it may be" that the rule would be different if not contraband, but no case has so held); *Matter of Horschler*, 116 Misc. 243, 190 N. Y. Supp. 355 (Co. Ct. 1921) (non-contraband held inadmissible, using this basis to distinguish the *Adams* case); *State v. Simmons*, 183 N. C. 684, 110 S. E. 591 (1922) (liquor; dictum thus distinguishes *Weeks* case); *Rosanski v. State*, 106 Ohio St. 442, 140 N. E. 370 (1922) (rests on contraband rule, but vigorous dictum for general admissibility; overruled on both points, *Nicholas v. City of Cleveland*, 125 Ohio St. 474, 182 N. E. 26 [1932]); *State v. Chester*, 46 R. I. 485, 129 Atl. 596 (1925) (dictum); *City of Sioux Falls v. Walser*, 45 S. D. 417, 187 N. W. 821 (1922) (liquor admissible; overruled in *State v. Gooder*, 57 S. D. 619, 234 N. W. 610 [1931]); *State v. Krinski*, 78 Vt. 162, 62 Atl. 37 (1905) (Vermont had adopted the rule of exclusion in *State v. Slamon*, 73 Vt. 212, 50 Atl. 1097 [1901], as to letters, but the court here refused to apply it to liquor; the *Slamon* case was repudiated in *State v. Stacy*, 104 Vt. 379, 401, 160 Atl. 257, 266 [1932], and Vermont now admits *all* such evidence).

¹³⁷*United States v. Stowell*, 133 U. S. 1, 16, 10 Sup. Ct. 244, 247 (1890). It is also suggested in some cases that the distinction rests upon the fact that the government *might have* obtained a warrant for such property but could not have obtained one for non-contraband property, so it is placed in the same positions as if a warrant had been applied for. The fact that possession could not be restored, when possession was unlawful, had some weight when the motion to return was the regular practice, the motion to suppress evidence without returning the property being a later growth. *Rosanski v. State*, *supra* note 136.

letter. Most courts never drew such a distinction, and the United States Supreme Court has repeatedly rejected it.¹³⁸

At one time the Georgia courts, attempting to reconcile inconsistent decisions on related questions, declared that a seizure from one's *person* compelled him to give evidence against himself, whereas other seizures did not.¹³⁹ But this distinction has been eliminated in favor of general admissibility.¹⁴⁰

Another exception covers evidence obtained by wire-tapping. The constitutional protection against search and seizure has been held inapplicable to wire-tapping so even where wire-tapping is unlawful by statute, the evidence is admissible under the rule that illegally obtained evidence is competent if no constitutional right is violated.¹⁴¹ This was accepted even in the federal courts, in the *Olmstead* case,¹⁴² until 1937, when an astute criminal lawyer seized upon an obscure provision of the Communications Act of 1934 and persuaded a majority of the Court that Congress had thus expressed its "intent" not merely to forbid wire-tapping but to ban the evidence obtained thereby.¹⁴³ Although the language is concededly susceptible of such interpretation, it is extremely doubtful that Congress realized that it was dealing with probably the most controversial rule of evidence of modern times. The Communications Act was designed "to provide for the regulation of interstate and foreign communication by wire or radio, and for other purposes".¹⁴⁴ The debates in Congress were entirely concerned with the communications "monopoly", and there was no specific

¹³⁸*Agnello v. United States*, 269 U. S. 20, 46 Sup. Ct. 4 (1925) (narcotics inadmissible); *Byars v. United States*, 273 U. S. 28, 47 Sup. Ct. 248 (1927) (counterfeit stamps); *Gambino v. United States*, 275 U. S. 310, 48 Sup. Ct. 137 (1927) (liquor). See also *People v. Defore*, 242 N. Y. 13, 18, 150 N. E. 585, 586 (1926); *Gore v. State*, 24 Okla. Cr. 394, 405, 218 Pac. 545, 549 (1923); *State v. McDaniel*, 115 Ore. 187, 231 Pac. 965 (1925).

"A search prosecuted in violation of the Constitution is not made lawful by what it brings to light." *Byars v. United States*, *supra*.

¹³⁹*Hammock v. State*, 1 Ga. App. 126, 58 S. E. 66 (1907), followed by a long line of Georgia Court of Appeals decisions.

¹⁴⁰*Calhoun v. State*, 144 Ga. 679, 87 S. E. 893 (1916); *Herndon v. State*, 178 Ga. 832, 174 S. E. 597 (1934) (property unlawfully seized from *person* admitted).

¹⁴¹*Olmstead v. United States*, 277 U. S. 438, 48 Sup. Ct. 564 (1928); *People v. McDonald*, 177 App. Div. 806, 165 N. Y. Supp. 41 (2d Dep't 1917) (although it is probable that the New York statute did not apply to the police, the court makes no decision on this point, holding the evidence admissible regardless); *Rowan v. State*, 3 Atl. (2d) 753 (Md. 1939) (admit wire-tapping evidence although its revelation in or out of court is now a federal felony). *Cf. Matter of J. Richard ("Dixie") Davis*, 252 App. Div. 591, 299 N. Y. Supp. 632 (1st Dep't 1937) (admitted in disbarment proceeding). And *cf. State v. Hester*, 137 S. C. 145, 134 S. E. 885 (1926) (dictaphone).

¹⁴²*Supra* note 141.

¹⁴³47 U. S. C. A. § 605 (Supp. 1938). The pertinent clause is that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." The case is *Nardone v. United States*, 302 U. S. 379, 58 Sup. Ct. 275 (1937), *rev'd* 90 F. (2d) 630 (C. C. A. 2d 1937).

¹⁴⁴Title of the Act, 48 STAT. 1064 (1934). See also §§ 1 and 2, on the scope and application of the Act.

reference to this section, tucked away among the "Miscellaneous Provisions" with the repealer section and other odds and ends.¹⁴⁵ The committee report hardly mentions it.¹⁴⁶ It is probable that Congress simply intended, as an incident to taking over the regulation of communications, to adopt penal provisions such as are found in most states, which had never been held to call for banning the evidence obtained by their violation. Congress itself was not too pleased to learn that it had expressed this intent, and a few months after this decision Senator Wheeler introduced a bill to permit wire-tapping by officers if the *head* of any executive department or independent establishment of the government certifies that he reasonably believes a violation of a federal criminal statute which he is charged with enforcing will be discovered by such means.¹⁴⁷ The bill passed the Senate, and it passed the House on the last day of the session, but was amended there and died in the closing hours.¹⁴⁸

But whatever Congress intended, the rule is now established. It makes no provision for warrants to tap wires upon "probable cause", although Justice Sutherland, in dissent, warns that we have enabled "the most depraved criminals to further their criminal plans over the telephone, in the secure knowledge that even if these plans involve kidnapping and murder, their telephone conversations can never be intercepted by officers of the law and revealed in court."¹⁴⁹ Although it is conceded that it would be equivalent to a search warrant for *evidence*, such as is never permitted as to tangible things, it would seem that the balance of policy should favor the granting of a restricted privilege under court supervision. Lacking that, the temptation to indiscriminate tapping is enormous, for many clues may

¹⁴⁵When Senator Dill was explaining the provisions of the Act, he said, "In Title VI will be found the miscellaneous provisions which are to provide for the transfer of employees and the records and property of the Radio Commission. . . ." 78 CONG. REC. 8826 (1934). There was no mention of the particular section. There was not even this much in the House.

¹⁴⁶SEN. REP. NO. 781, 73rd Cong., 2d Sess. (1934) 11. "Section 605, prohibiting unauthorized publication of communications, is based upon Section 27 of the Radio Act and extends it to wire communications." The section referred to, formerly 47 U. S. C. A. § 107, under which there were no decisions, was enacted without mention either in debates or committee reports. See SEN. REP. NO. 772, 69th Cong., 1st Sess. (1926); H. R. REP. NO. 464, 69th Cong., 1st Sess. (1926); H. R. REP. NO. 1886, 69th Cong., 2d Sess. (1927). And it obviously was not concerned with rules of evidence, for radio communications would not likely be used for criminal purposes.

In 1932, bills designed expressly to exclude evidence obtained by wire-tapping had been introduced but had died in committee. S. 1396 and H. R. 5305 (72d Cong., 1st Sess.). In 1933, there was inserted in the appropriation act for Prohibition enforcement a proviso that none of the appropriation should be expended for wire-tapping, but there was no suggestion of excluding the evidence. 47 STAT. 1381 (1933).

¹⁴⁷S. 3756. It was reported by unanimous committees of both houses. SEN. REP. NO. 1798 and H. R. REP. 2656, 75th Cong., 2d Sess. (1938).

¹⁴⁸The amendment imposed heavy penalties on officers tapping wires without proper authority. The tragedy is that this committee amendment which resulted in the death of the bill was simply repetitive of identical general provisions in § 501, and added nothing whatever.

¹⁴⁹Nardone v. United States, 302 U. S. 379, 385, 58 Sup. Ct. 275, 278 (1937).

be uncovered thereby even if they cannot be used in court. Better to provide a way to do it legally when the court is satisfied of the necessity, and then to provide effective sanctions to keep the police within these reasonable limits. But of that more later.

The Act, as thus interpreted, plainly excludes the evidence even though obtained by a private individual,¹⁵⁰ which is unlike the rule as to ordinary search and seizure.¹⁵¹ There is a conflict among the lower federal courts, seeking vainly for the details of that imaginary Congressional intent, as to whether the ban applies only to *interstate* communications intercepted, or to *all* communications.¹⁵² The second question has yet to come before the Supreme Court, which has only ruled on the former.¹⁵³

Thus it must be conceded that the exceptions to the federal rule, although some of them are sufficiently inconsistent to tend to discredit the rule, are on the whole not of great significance.¹⁵⁴ Argument founded on these

¹⁵⁰See *supra* note 143. "No person. . ."

¹⁵¹*Supra* notes 68 and 118.

¹⁵²The First and Fifth Circuits have squarely held that the Act only applies to interstate messages, and have admitted evidence of tapped local communications. *Valli v. United States*, 94 F. (2d) 687 (C. C. A. 1st 1938); *Ginsberg v. United States*, 96 F. (2d) 433 (C. C. A. 5th 1938). The Second Circuit has just held such evidence admissible. *N. Y. Times*, April 11, 1939, p. 46, col. 2 (the official title of the case is not given; the defendants were Goldstein, Krupp, Weiss, and Gross).

But the contrary view, justified by the language of the section if not by the purported scope of the Act, has also been expressed. *United States v. Plisco*, 22 Fed. Supp. 242 (D. D. C. 1938); *Sablowski v. United States*, 101 F. (2d) 183 (C. C. A. 3rd, Dec. 9, 1938).

¹⁵³The *Nardone* case concerned interstate messages. Although *certiorari* was granted in the *Valli* case, 58 Sup. Ct. 760 (1938), the petitioner dismissed his appeal, 58 Sup. Ct. 1053 (1938).

¹⁵⁴One more "exception", if such it can be called, is the universally recognized principle that illegally obtained evidence is admissible in a civil action, for no question of violation of constitutional rights is there involved. Generally it is immaterial that it was obtained by the party's own wrong. *Mossman v. Thorson*, 118 Ill. App. 574 (1905) (admitting papers which one party induced the other to send to her P. O. box by fraud); *Sullivan v. Nicoulin*, 113 Iowa 76, 84 N. W. 978 (1901) (defendant claimed plaintiff's plastering job defective but would not let his witnesses inspect it; they got in under an unlawful court order but were allowed to testify); *Cluett v. Rosenthal*, 100 Mich. 193, 58 N. W. 1009 (1894) (copies of defendant's books made while held under a void attachment; plaintiff's attorney had made the attachment and copies while employed by another person; the Supreme Court had ordered him to return the copies to right an abuse of process, *Rosenthal v. Muskegon Circuit Judge*, 98 Mich. 208, 57 N. W. 112 [1893], but meanwhile he had taken the copies to this plaintiff, been retained, and used them in evidence; held admissible because there was no abuse of process by this plaintiff—other cases do not seem to regard the plaintiff's wrong as material); *Matter of Davis*, 252 App. Div. 591, 299 N. Y. Supp. 632 (1st Dep't 1937) (wire-tapped evidence admitted in disbarment proceedings; wires were tapped by police, and the court suggests that "a very serious situation" would arise if it had been done by the petitioner); *DeLore v. Smith*, 67 Ore. 304, 136 Pac. 13 (1913) (defendant testified to conversation between plaintiff and daughter on a country party line telephone); *Stockfleth v. DeTastet*, 4 Camp. 10, 171 Eng. Rep. 4 (N. P. 1814) (plaintiff's attorney, when acting for the bankruptcy commissioners, had improperly examined defendant about plaintiff's claim; Lord Ellenborough admitted the evidence although the attorney had abused the authority of the Great Seal).

Many of the cases have arisen where court records, and the like, were removed from

inconsistencies is weak, in that the best answer to such argument would be to plug the gaps by statute. The rule must be attacked on broader grounds.

III. PRO AND CON

What, then, are the arguments? When a person is illegally arrested or his property illegally seized, what course is more consonant with sound public policy? Although most of these arguments would apply equally to arrest and to search and seizure, the controversy has centered around the latter and we shall discuss the problem with special reference to search and seizure.

The question is one upon which reasonable and honest men may differ, and none be heard to say that the one group is seeking to set at naught our constitutional liberties or that the other is seeking advantage for the criminal classes.¹⁵⁵ Although there has been an effort to separate the sheep from the goats, to call the rule of exclusion the liberal view, no liberal need apologize for espousing either view when we find three great liberal jurists in disagreement, Holmes and Brandeis¹⁵⁶ on the one side, Cardozo¹⁵⁷ on

the files surreptitiously, without a proper court order. They are invariably held admissible. *Stevison v. Earnest*, 80 Ill. 513 (1875); *Citizens' National Bank of Pocomoke City v. Custis*, 153 Md. 235, 138 Atl. 261 (1927); *Jordan v. Lewis*, 14 East 305 note, 104 Eng. Rep. 618 (1740); *Legatt v. Tollervey*, 14 East 302, 104 Eng. Rep. 617 (1811). Cf. *People v. Alden*, 113 Cal. 264, 45 Pac. 327 (1896) (criminal case).

The same rule has been applied in a *civil* proceeding by the *government* to abate a nuisance, even though there was an unconstitutional seizure. *McColl v. Hardin ex rel. State*, 70 S. W. (2d) 327 (Tex. Civ. App. 1934). But that rests on interpretation of the word "criminal" in a statute, for exclusion of the evidence does not rest on the constitution in Texas. The federal rule has recently been extended to exclude the evidence in civil proceedings by the government to recover taxes. *Rogers v. United States*, 97 F. (2d) 691 (C. C. A. 1st 1938), noted (1938) 6 U. OF CHI. L. REV. 113; *Contra: Camden County Beverage Co. v. Blair*, 46 F. (2d) 648 (D. N. J. 1930), *app. dismissed*, 46 F. (2d) 655 (C. C. A. 3rd 1931) (revocation of license).

The rule in civil cases is a strange inversion of the criminal rules. A civil plaintiff may not take advantage of his wrong in obtaining jurisdiction (*supra* note 30), but may use evidence illegally obtained; the state may take advantage of its officers' wrongs in arresting defendants, but the federal rule will not permit the use of evidence illegally obtained by them!

¹⁵⁵"For some reason not easily ascertainable, a great deal of asperity appears in the writings on the subject, particularly among those who can write free from any responsibility except the judgment of their readers." Finch, J., in *People v. Defore*, 213 App. Div. 643, 652, 211 N. Y. Supp. 134, 142 (1st Dep't 1925).

¹⁵⁶See particularly their dissents in the *Olmstead* case, *supra* note 141. Even Justice Holmes did not always feel as strongly as he later did, for when on the Massachusetts bench he declared, "The mode in which the officer got his knowledge of what the girl had in her hand [by an unlawful search of her person] did not make the fact inadmissible." *Commonwealth v. Welch*, 163 Mass. 372, 40 N. E. 103 (1895). Conceded that he was faced with a long line of precedents, still Justice Holmes was not one to state a rule he disapproved without at least mentioning that fact.

¹⁵⁷See *People v. Defore*, 242 N. Y. 13, 150 N. E. 585 (1926). It is true that he was faced with the precedent of the *Adams* case, *supra* note 83, but a preliminary motion was made by Defore, a basis on which many lesser judges had been able to cast aside contrary precedents; Judge Cardozo's hands were free, and his ringing words reveal that he and New York's greatest Court of Appeals made a free choice after a thorough reexamination of the whole question. It has been suggested that Cardozo had been converted before his death, for he joined the majority in the *Nardone* case, *supra* note

the other. It is not a choice between a good principle and a bad principle but between two good principles, and the problem is to strike a balance.

When the weight of the federal courts is thrown onto the scales—though their criminal jurisdiction is comparatively limited—the nation's courts are about evenly divided. It has been said that the rule of admissibility is a dying doctrine, because over a dozen states have been converted from that rule to the rule of exclusion.¹⁵⁸ But it was inevitable that a doctrine arising at a very late date, with the prestige of the Supreme Court behind it, should cause defections among the followers of an established rule. On the other hand, four states, whose appellate courts had adopted the federal rule even before the Supreme Court had made up its mind, re-examined the federal rule after the *Weeks* case¹⁵⁹ and cast it aside.¹⁶⁰ And about nine states, considering the question for the first time, faced with the *Weeks* case and free to choose, chose the rule of admissibility.¹⁶¹ A number of the other courts that had long followed the rule of admissibility as a matter of course were moved to re-examine the rule and declared unequivocally that the rule should not be changed.¹⁶²

The one all-inclusive argument for admitting evidence irrespective of how it was obtained is that the manner of obtaining the evidence is immaterial to the merits of the question before the court, namely the guilt or innocence of the accused.¹⁶³ And this is true whether the issue is raised before or at the trial.¹⁶⁴ When a court is presented with the question of a defendant's guilt, it needs all relevant reliable evidence, and it is illogical to suppress any such evidence, either as compensation for a trespass or as punishment

149, but it must be remembered that no question of constitutional law or of policy was before the Court. Congress had spoken, and the sole question was what it had intended to say.

¹⁵⁸Idaho, Illinois, Michigan, Mississippi, Missouri, Montana, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Washington, and West Virginia. See cases cited *supra* notes 91, 92 and 93. The others adopting the federal rule had had no earlier cases on the point.

¹⁵⁹*Supra* note 89.

¹⁶⁰Georgia, Iowa, South Carolina, and Vermont. The cases are cited *supra* notes 88 and 93.

¹⁶¹Colorado, Delaware, Nevada, New Jersey, New Mexico, North Dakota, Pennsylvania, Utah, and Virginia. See cases cited *supra* note 95.

¹⁶²See the more recent of the cases from these states, cited *supra* note 95: Alabama, California, Kansas, Louisiana, Massachusetts, New York, South Carolina, and a few others. These courts in particular do not speak like courts following a precedent because of *stare decisis*. They have now heard the new arguments introduced by the *Weeks* case, and they are unconvinced. Some of these opinions, like several of those in the preceding footnote, are classics of their kind.

¹⁶³The defendant is released, not because he is innocent, but because the postal inspector secured without instead of with a warrant the proofs of his guilt." *Flagg v. United States*, 233 Fed. 481, 487 (C. C. A. 2d 1916) (reluctant concurring opinion of Veeder, J.).

"Are the letters less criminal, if the person who stopped them did not punctually observe the directions of that statute?" Bishop Atterbury's Trial, 16 How. St. Tr. 323, 630 (1723) (argument of counsel, adopted by the House of Lords).

¹⁶⁴See *State v. Fahn*, 53 N. D. 203, 209, 205 N. W. 67, 69 (1925).

of the officers for "dirty business".¹⁶⁵ The rejection of the evidence will not punish the offending officer; it will punish all society.¹⁶⁶ As was said by Judge Finch,

"To be unable to find a murderer guilty, although competent evidence is before the court to warrant a conviction, for the reason that someone else is guilty of petit larceny in connection with obtaining such evidence, seems a handicap rather than a help to the administration of justice."¹⁶⁷

The rules of evidence are designed to reach the truth and to secure a fair trial to one accused of crime.¹⁶⁸ Evidence is no less reliable, no less true, because obtained by other than nice ethical conduct—obtained, if you will, by gross invasions of constitutional rights. If a criminal's arsenal is discovered by an illegal search on mere suspicion, is the criminal to go free, to resume his preying on society? True, he would have remained free if the officer had observed the constitutional restraints, and not even a court order could legalize such a search on mere suspicion—so much is necessary to protect the innocent from lawless invasions of their privacy. But when the invasion *has* occurred, when the court can look back and see that the victim of the invasion was *not* innocent, then, although the officer's wrong is the same and should be punished accordingly, the protection of the *innocent* does not require the exclusion of evidence of guilt.¹⁶⁹

This is not like the "third degree". Evidence extorted by such means is inherently unreliable, since a person under such pressure would say anything to buy peace. But the gun which is seized is just as much a gun, and is just as much in the defendant's possession, whether it is seized legally or illegally. A conversation heard upon a tapped wire is just as reliable as one heard on the street—probably more so today, with modern recording devices.¹⁷⁰

¹⁶⁵See *State v. Dillon*, 34 N. M. 366, 376-7, 281 Pac. 474, 478-9 (1929).

And there is remarkable language from the Supreme Court itself, in rejecting an extension of the rule, which could well be used against the whole federal rule: "We are concerned not with their [the officers'] liability but with the interest of the government in securing the benefit of the evidence seized." *McGuire v. United States*, 273 U. S. 95, 99, 47 Sup. Ct. 259 (1927).

¹⁶⁶"The criminal is to go free because the constable has blundered." Cardozo, J., in *People v. Defore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926).

"The sins of the [officer], for which the person aggrieved has not chosen to seek redress or punishment, are visited upon the only party whose claim to consideration is unimpeachable, namely the United States." *Flagg v. United States*, 233 Fed. 481 (C. C. A. 2d 1916) (reluctant concurring opinion of Veeder, J.).

See also Chief Justice Taft's language in *Olmstead v. United States*, 277 U. S. 438, 468, 48 Sup. Ct. 564, 569 (1928).

¹⁶⁷*People v. Defore*, 213 App. Div. 643, 652, 211 N. Y. Supp. 134, 142 (1st Dep't 1925).

¹⁶⁸See *State v. Reynolds*, 101 Conn. 224, 235, 125 Atl. 636, 639 (1924); *People v. Esposito*, 118 Misc. 867, 873, 194 N. Y. Supp. 326, 333 (Ct. Sp. Sess. 1922).

¹⁶⁹As stated in *State v. Chin Gim*, 47 Nev. 431, 441, 224 Pac. 798, 800 (1924), by the contrary holding "the sanctity of the castle is converted into a sanctity for crime."

¹⁷⁰In the brief of the American Civil Liberties Union against the admissibility of

There is some suggestion that the admission of illegally obtained evidence violates the presumption of innocence, in that the accused is considered guilty and left to prove his way out.¹⁷¹ But the victim of an illegal seizure is not, any more than any other accused, "considered guilty". The evidence thus obtained is presented to the jury just as is any other competent evidence, and the defendant, as in all cases, must raise a reasonable doubt of his guilt. The presumption of innocence does not go so far as to exclude proofs tending to show the defendant's guilt! We must not pervert it to mean that a man is conclusively presumed innocent until he gives himself away.

The issue then becomes whether there is a policy, some public necessity, sufficiently strong to warrant excluding such evidence in spite of its tendency to reach the truth. Certain "privileges" are recognized where such a public policy exists, for "truth, like all the good things, may be loved unwisely, may be pursued too keenly, may cost too much."¹⁷² Mr. Justice Brandeis has expressed great concern for the privacy of what is "whispered in the closet".¹⁷³ But crime operates by means of just such "whispers in the closet". And when an officer, however unlawfully, has discovered positive evidence of crime conducted by means of such "whispers", is there any public policy that requires that its secrecy be preserved? Does it not rather demand that the secret be dragged into the light? Whatever is "proper and confidential", to use again the words of Justice Brandeis, will not be exposed in court, for if it is thus "proper", no crime being revealed thereby, it will never appear in court. Likewise there should be no privilege for the private arsenal or for other tangible evidences of crime.

In this connection, a fear has been expressed that freedom of opinion will be endangered if such evidence may be received.^{173a} A system of espionage of the Old World variety is visioned, wherein one's privately expressed opinions and his copy of Marx behind the door in the library¹⁷⁴ will be ferreted out and used in evidence against him—for just what crime is not

wire-tapped evidence, there is given a shocking account of inaccurate and perjured evidence given by the officers who tapped the wires in the *Olmstead* case. But this argument has nothing to do with the illegal means of obtaining the evidence. Dishonest witnesses can perjure one kind of evidence as well as another. Courts will always receive conversations overheard on the street by casual bystanders, months after they occurred, the inaccuracy of their hearing or their memory and the honesty of their report going to the credibility of the testimony but not operating to exclude it.

¹⁷¹Delegate Dyett thus expressed himself in the Constitutional Convention. CONVENTION RECORD (N. Y. 1938) 548-9.

¹⁷²Pearse v. Pearse, 1 DeG. & Sm. 12, 28, 63 Eng. Rep. 950, 957 (1846), referring to the attorney-client privilege.

¹⁷³"Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet." *Olmstead v. United States*, 277 U. S. 438, 473, 48 Sup. Ct. 564 (1928).

^{173a}See speech of Governor Lehman. N. Y. Times, June 18, 1938, p. 1, col. 2.

¹⁷⁴His copy of *Das Kapital* gave much concern to one of the delegates to the New York Convention.

made clear. So long as we have no political crimes, we need not fear that such evidence will be used to our hurt. Some fear, perhaps justifiably, that we may see again the Sedition Acts of old, and they feel that we should begin now to exclude illegally obtained evidence and not set a precedent which may be availed of at that time. But the government that so far breaks with our time-honored traditions of freedom of speech and opinion, that so far ignores Constitutional restrictions¹⁷⁵ as to make one's views criminal, will not be deterred by another tradition a quarter of a century old! If we are to have political crimes, the necessary rules of evidence will come in as their hand-maidens, even though we exclude them now. Therefore, we need not fear that we are setting dangerous precedents for those who will need none. The question is properly considered in the light of what we, today, recognize as crimes. If the guardians of liberty will focus their attention on the substantive law, they need not fear that any innocent man will suffer from the admission of any reliable evidence.

Is there anything in the state or federal constitutions that requires that the courts recognize such a privilege? None of them expressly so provide, but efforts have been made so to construe several of the clauses of the constitutions. It has universally been recognized that the admission of the evidence does not violate the "due process" clause of the Fourteenth Amendment. As applied to judicial proceedings, due process requires only that the accused have sufficient notice and adequate opportunity to defend.¹⁷⁶

Defense attorneys seeking a constitutional theory upon which to rest their demands dug up and dusted off the gratuitous dictum of Justice Bradley in the *Boyd* case,¹⁷⁷ which had been but scotched in the *Adams* case,¹⁷⁸ and persuaded the Supreme Court that when evidence was obtained by a violation of the Fourth Amendment, its use in court was a violation of the Fifth in that it compelled the defendant to "be a witness against himself". The result is the same to the defendant, it was said, whether he is obliged himself to supply the evidence or whether it is taken from him by an illegal seizure; in either case he is the unwilling source of the evidence.¹⁷⁹ The government could not lawfully compel the defendant to produce the evidence, so it cannot do so unlawfully.¹⁸⁰ But this argument proceeds upon the premise that the Constitution confers an immunity from conviction upon evidence which a person is able to conceal from open view or from

¹⁷⁵Prof. R. E. Cushman, in 1 ENCY. SOC. SCI. (1930) 635, expresses the opinion that the Sedition Act was unconstitutional. The Supreme Court never passed upon it. Cf. *Herndon v. Lowry*, 301 U. S. 242, 57 Sup. Ct. 732 (1937).

¹⁷⁶*Banks v. State*, 207 Ala. 179, 186, 93 So. 293, 303 (1921) (full discussion); *People v. Defore*, 242 N. Y. 13, 28, 150 N. E. 585, 590 (1926). Cf. *Twining v. New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14 (1908).

¹⁷⁷116 U. S. 616, 6 Sup. Ct. 524 (1886).

¹⁷⁸192 U. S. 585, 24 Sup. Ct. 372 (1904).

¹⁷⁹See particularly *Gould v. United States*, 255 U. S. 298, 306, 41 Sup. Ct. 261 (1921).

¹⁸⁰See *State v. Wills*, 91 W. Va. 659, 669, 114 S. E. 261, 265 (1922).

lawful process—that it would be unfair to make a defendant the instrument of his own destruction. This is a doctrine as dangerous as it is questionable. The federal cases look to *Entick v. Carrington*¹⁸¹ as their guide—but it was there said by Lord Camden that the prohibition against compelling self-incrimination rests on the fact that “The *necessary means of compelling self-accusation*, falling upon the innocent as well as the guilty, would be both cruel and unjust.” There is no suggestion that all evidence of which the defendant is the “unwilling source” is to be excluded. And it might be added that the defendant is as much the “unwilling source” of evidence seized under *lawful* warrant, yet it has never been suggested (except in the *Boyd* dictum) that evidence so obtained could not be used.¹⁸² Professor Wigmore declares,¹⁸³ and the cases support him,¹⁸⁴ that the Fifth Amendment concerns only testimonial compulsion, statements and evidence which one is compelled to make or produce under court process directed against him as a witness, either before or at the trial. When the defendant is not himself compelled to produce the evidence, when it is seized by an officer lawfully or unlawfully, the evidence given on the stand is not his but is the evidence of the officer testifying about his own observations; and the real evidence, the article seized, speaks for itself and is not evidence given by the accused.¹⁸⁵

But the privilege against self-incrimination is no protection to a corporation.¹⁸⁶ So a new trick was pulled out of the bag in the *Silverthorne* case,¹⁸⁷ which rested the federal rule on a new ground: that the prohibition against unreasonable search and seizure extends not only to the *fact* of search and seizure but to every incident of it.¹⁸⁸ Since the purpose of the search was to obtain evidence, it is pure sophistry to declare, as courts frequently have done,¹⁸⁹ that the search and the subsequent use of the evidence are distinct

¹⁸¹19 How. St. Tr. 1029 (1765).

¹⁸²That such evidence could be used was the clearest holding in *Adams v. New York*, *supra* note 178, and this much of the *Boyd* dictum has never recovered. See also *Commonwealth v. Dabbierio*, 290 Pa. 174, 178-9, 138 Atl. 679, 681 (1927), and dissent in *State v. Owens*, 302 Mo. 348, 397, 259 S. W. 100, 115 (1924).

¹⁸³4 WIGMORE, EVIDENCE (2d ed. 1923) §§ 2263 ff.

¹⁸⁴See, on its application to search and seizure, *Banks v. State*, *Commonwealth v. Dabbierio*, and other cases cited *infra* note 185.

¹⁸⁵*Banks v. State*, 207 Ala. 179, 93 So. 293 (1921), *cert. den.*, 260 U. S. 736, 43 Sup. Ct. 96 (1922); *People v. LeDoux*, 155 Cal. 535, 102 Pac. 517 (1909); *State v. Reynolds*, 101 Conn. 224, 125 Atl. 636 (1924); *State v. Johnson*, 116 Kan. 58, 226 Pac. 245 (1924); *State v. Rogne*, 115 Minn. 204, 132 N. W. 5 (1911); *Pringle v. State*, 108 Miss. 802, 67 So. 455 (1915); *State v. Pomeroy*, 130 Mo. 489, 32 S. W. 1002 (1895); *State v. Flynn*, 36 N. H. 64 (1858); *Commonwealth v. Dabbierio*, 290 Pa. 174, 138 Atl. 679 (1927); *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1021 (1894). *Cf.* *State v. Miller*, 71 N. J. L. 527, 60 Atl. 202 (1905), and *Matter of Schmidt v. District Attorney*, 255 App. Div. 353, 8 N. Y. Supp. (2d) 787 (4th Dep't 1938) (medical examination). See note in this issue, (1939) 24 CORNELL L. Q. 437.

¹⁸⁶*Hale v. Henkel*, 201 U. S. 43, 74, 26 Sup. Ct. 370, 378 (1906).

¹⁸⁷251 U. S. 385, 40 Sup. Ct. 182 (1920).

¹⁸⁸See dissent in *State v. Prescott*, 125 S. C. 22, 117 S. E. 637 (1923).

¹⁸⁹See *People v. Mayen*, 188 Cal. 237, 205 Pac. 435 (1922); *State v. Reynolds*, 101 Conn. 224, 125 Atl. 636 (1924); *State v. Chuchola*, 32 Del. 133, 120 Atl. 212 (Ct. Gen.

transactions. But, distinct transaction or no, there is much room to question whether it was ever intended to impose this additional sanction. The provision operates upon legislatures to bar them forever from making unreasonable searches and seizures lawful, upon executives to bar them from enforcing such laws, and upon the courts to bind them to punish such searches and seizures whether made with or without legislative sanction.¹⁹⁰ But the Constitution lays down no rule of evidence. This provision was "designed to protect the intimate sanctity of the person and the home from invasion by the state. . . . The Constitution and the laws of the land are not solicitous to aid persons charged with crime to conceal or sequester evidence of their iniquity."¹⁹¹ When the invasion of the home has been effected, the violation of the Constitution is complete. It is neither the possession of property nor the use of evidence, but the sanctity of homes, that is the concern of the Constitutional guaranty.

This surely is the correct view historically. For while the proponents of the rule of exclusion look fondly back to *Entick v. Carrington*¹⁹² as the parent of their rule, that case is far from authority for them. It granted damages to Entick against the instigator of the search, but nowhere in the opinion is there a suggestion that the evidence should be suppressed and the officers be compelled to purge their minds of all knowledge gained thereby.¹⁹³ Nor did James Otis, when he made his great speech in Boston denouncing the writs of assistance, concern himself with the use of the evidence; it was the invasion of homes that prompted him to make his attack.¹⁹⁴ It was never the law of England, of the Colonies, or of any state in the Union until more than a century after the Revolution, yet we are glibly told that it is a fundamental right of Englishmen that no evidence illegally taken from them may be used against them!

But it is said that excluding the evidence is the only practical means of making the Constitutional guaranty effective. Reserving the question of the ineffectiveness of other remedies, just what does this "more effective"

Sess. 1922); *State v. Johnson*, 116 Kan. 58, 226 Pac. 245 (1924); *State v. Dillon*, 34 N. M. 366, 281 Pac. 474 (1929).

¹⁹⁰Judge Lumpkin in *Williams v. State*, 100 Ga. 511, 28 S. E. 624 (1897). See also *Adams v. New York*, *supra* note 178.

¹⁹¹*People v. Mayen*, 188 Cal. 237, 249, 251, 205 Pac. 435, 440 (1922).

¹⁹²19 How. St. Tr. 1029 (1765).

¹⁹³Lord Camden gives as the reason for the privilege against self-incrimination that "the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust." The same reason is implicit in the bar of a general search for evidence. But a search could only be "cruel and unjust" to the innocent at the time of the invasion of the home, not at the admission of the evidence. The search of the innocent would reveal no incriminating evidence, and there would be none to admit; the hardship, if any, would fall only on the guilty. Only the obtaining, not the subsequent use, is cruel and unjust to the innocent. See *State v. Dillon*, 34 N. M. 366, 373, 281 Pac. 474, 477 (1929).

¹⁹⁴The significant portion of the speech will be found in 2 WATSON, THE CONSTITUTION (1910) 1416.

remedy add? To the rights of the innocent man it would add not one iota. The speeches in the New York Constitutional Convention are replete with harrowing stories of innocent victims of vicious searches in which no evidence was found.¹⁹⁵ The speakers then go on to say that the constitutional guaranty is meaningless if the evidence is admissible. But they fail utterly to connect up these two points and show how the innocent victim is helped in the slightest by the fact that the evidence which was *not* found would be inadmissible! As a means of reparation for a wrong done an innocent man, the exclusion of evidence is no help.¹⁹⁶

The only person benefitted by the suppression of incriminating evidence is the guilty man with something to conceal.¹⁹⁷ True, *his* constitutional rights have been violated, but are we justified in providing an additional remedy, above those ordinarily granted to individuals who have been wronged, a remedy useful only to a law-violator? It has been said by Judge Learned Hand that "the Constitution protects the guilty along with the innocent."¹⁹⁸ It might more accurately be said, as in the *Weeks* case,¹⁹⁹ that it protects those *accused of crime*, because of the possibility—the presumption—that they are innocent. But should it be so interpreted as to shield those faced with actual evidence of their guilt from just punishment therefor? Judge Seabury well expressed the thought a few years ago:

"As we look at some of the uses which the criminal classes have made of constitutional provisions, one might suppose that the far-seeing barons who wrung the great charter from King John at Runnymede were intent upon safeguarding the twentieth century racketeer, gangster, kidnapper, gunman and corrupt political leader in the prosecution of their sinister vocations. It ought to be possible to find a way, by judicial interpretation, to use these constitutional provisions for the protection of liberty without giving them such fanciful and far-fetched interpretations as to convert them into a weapon by which criminals can make war safely upon organized society and its law-abiding members."²⁰⁰

¹⁹⁵See particularly pages 487-92 of the Convention Record.

¹⁹⁶Whether it will help the innocent victims indirectly by discouraging *further* searches will be considered presently.

¹⁹⁷"It would have been consoling and gratifying to the defendant, of course, if the judge had . . . [returned] his whisky, with an apology, and without allowing the state to prove that the whisky was found in the defendant's possession. Perhaps that would have atoned for the sheriff's wrongdoing as far as the defendant was concerned, but how about the law-abiding public? They are . . . the complainants in both accusations." *State v. Eddins*, 161 La. 240, 247, 108 So. 468, 470 (1926).

¹⁹⁸*United States v. Casino*, 286 Fed. 976, 978 (S. D. N. Y. 1923).

¹⁹⁹232 U. S. 383, 392, 34 Sup. Ct. 341, 344 (1914).

²⁰⁰Address at annual dinner of American Law Institute, May 7, 1932. (1932) 18 A. B. A. J. 371.

Cf. the language of Chief Justice Marshall of Ohio in *Rosanski v. State*, 106 Ohio St. 442, 462, 140 N. E. 370, 376 (1922): "If all the doctrines which are being urged by attorneys representing . . . law violators should be adopted by the courts as the true interpretation of our sacred Bill of Rights, it would no longer be recognized as a charter of government and as a guaranty of protection of the weak against the aggressions of the strong, but rather as a charter of unbridled license and a certificate of character to the criminal classes."

There is another argument that is made, apart from all questions of constitutional construction. It is the argument of public policy, that the court should not ratify the illegal search by receiving the evidence obtained thereby. Although it is conceded that no officer is authorized to commit a crime on behalf of the government, and an officer's illegal acts are beyond the scope of his authority, yet it is argued that if the government, through the courts, avails itself of the fruits of the officer's crime, it thereby sanctions the illegal means by which the evidence was obtained.²⁰¹ The fact that evidence of crime was found by a search unlawful in its inception does not purge the search of its illegality. This much must be admitted.²⁰² For we cannot accept the philosophy that the end justifies the means, that the law-violating officer is to be excused if his offense reveals another.²⁰³ But does it follow that the court, in accepting the evidence, is "allowing such iniquities to succeed"?²⁰⁴ Both the officers and the courts are peculiarly charged with the duty of enforcing the Constitution and the laws. When one of these agencies fails this duty and itself violates the law, the other is derelict in its duty if it then refuses to enforce the law. It should not be within the power of one of these agencies, the officers, to tie the hands of the other, the

²⁰¹See *Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341 (1914); *State v. Arregui*, 44 Ida. 43, 254 Pac. 788, 792 (1927); *Gore v. State*, 24 Okla. Cr. 394, 218 Pac. 545, 550 (1923); *State v. Wills*, 91 W. Va. 659, 114 S. E. 261 (1922); *Hoyer v. State*, 180 Wis. 407, 193 N. W. 89 (1923).

The same argument was made in connection with illegal arrest, but was almost universally rejected, even by the United States Supreme Court. Two state cases and a since discredited federal case accepted the argument. *State v. Simmons*, 39 Kan. 262, 18 Pac. 177 (1888); *Re Robinson*, 29 Neb. 135, 45 N. W. 267 (1890); *Tennessee v. Jackson*, 36 Fed. 258, 1 L. R. A. 370 (E. D. Tenn. 1888).

²⁰²Nevertheless, some eighteen states, including nine which adopt the federal rule as to search and seizure, have declared by statute or decision that an *arrest*, even without any justification whatever, may become lawful if it develops that a felony has in fact been committed. See *supra* note 46.

And those who throw up their hands in holy horror at the idea of judging an officer's crime by its results should be reminded that this concept is no stranger to our law. A simple assault may become a far graver offense if the victim happens to land on his head, and driving seventy miles an hour through a school zone is a misdemeanor or a felony, depending upon its results. However, we shall not labor this point, for there are less debatable grounds upon which to rest the argument.

²⁰³To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution." Justice Brandeis' dissent in *Olmstead v. United States*, 277 U. S. 438, 485, 48 Sup. Ct. 564 (1928).

See also *Byars v. United States*, 273 U. S. 28, 29, 47 Sup. Ct. 248 (1927); *Town of Blacksburg v. Beam*, 104 S. C. 146, 88 S. E. 441 (1916).

²⁰⁴Justice Holmes dissenting in *Olmstead v. United States*, *supra* note 203 at 470.

Just why the government is permitted to "adopt the unlawful seizure" in *forfeiture* cases yet may not do so for the purpose of using the evidence is hard to fathom. But Justice Holmes says that they rest upon a different footing. *Dodge v. United States*, 272 U. S. 530, 47 Sup. Ct. 191 (1926). Canada likewise draws a distinction—and reaches opposite results on each point! *Supra* note 98.

Furthermore, the court just as much takes advantage of a wrong when it uses evidence wrongfully obtained by a private individual, but of all the judicial votaries of the federal rule only Justices Holmes and Brandeis have seen this. See their dissent in *Burdeau v. McDowell*, 256 U. S. 465, 41 Sup. Ct. 574 (1921).

courts, and thus confer a virtual immunity upon an offender against society. Two wrongs do not make a right, and the courts do not ratify or condone one wrong by refusing to apply to it indirect sanctions that operate not to punish that wrongdoer but to release another in the face of evidence of his guilt! The plain duty of the court is to punish every wrong that is brought to its attention, and if existing sanctions for this purpose are inadequate, the energies of the Legislature should be directed to devising more effective direct remedies.²⁰⁵

For the same reason, the "unclean hands" argument, which is occasionally raised,²⁰⁶ must be rejected. Equity, so far as it has as its object the redress of private wrongs, can afford to refuse its extraordinary aid to those who have acted unfairly in connection with the transaction. But criminal courts exist for the protection of society, and they fail this purpose, this duty, if they release a prisoner in the face of evidence of his guilt because another has failed the same duty.

There is another important argument of public policy which must be met. It is best expressed by Justice Brandeis:

"In a government of laws, the existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."²⁰⁷

It is true that public respect for law is gravely impaired when the police disregard constitutional safeguards. But public confidence is equally betrayed when criminals escape punishment for demonstrable guilt. Far better it would be to provide effective means to punish both the offending officer and the criminal whose crime is thus fortuitously revealed.

In this connection we are told that conviction of a person by such evidence "shocks the common man's sense of decency and fair play".²⁰⁸ This is what old Jeremy Bentham so aptly labeled the Fox-Hunter's Reason, introducing into criminal law the sportsman's concept of fairness.²⁰⁹ Not every man has pursued the wily fox, but every fair-minded citizen, when he was a child

²⁰⁵The argument of the federal courts on this point is best repudiated in *Williams v. State*, 100 Ga. 211, 28 S. E. 624 (1897); *State v. Eddins*, 161 La. 240, 108 So. 468 (1926); *Commonwealth v. Wilkins*, 243 Mass. 356, 138 N. E. 11 (1923); *Hall v. Commonwealth*, 138 Va. 727, 121 S. E. 154 (1924).

²⁰⁶See Justice Brandeis' dissent in *Olmstead v. United States*, *supra* note 203 at 483.

²⁰⁷Dissent in *Olmstead v. United States*, *supra* note 203 at 485.

²⁰⁸"The shock to the sensibilities of the average citizen when his government violates a constitutional right of another is far more evil in its effect than the escape of any criminal through the courts' observance of those rights." *State v. Arregui*, 44 Ida. 43, 58, 254 Pac. 788, 792 (1927).

²⁰⁹Brandeis, J., dissenting in *Burdeau v. McDowell*, 256 U. S. 465, 477, 41 Sup. Ct. 574 (1921).

²¹⁰BENTHAM, *Rationale of Judicial Evidence* in 7 WORKS (Bowring's ed. 1843) 452 ff.

playing "cops and robbers",²¹⁰ knew that if the "cops" took unfair advantage of the "robbers", the captured robbers had to be released and given a new chance to hide. And this admirable spirit of fair play is carried over in the minds of many citizens and is applied by them to the real-life "cops and robbers" situation. But we must remember that this is not a harmless game engaged in by equals, and that there are other factors to be considered besides the wrong done by one group of children to another,—that the robbers released will not run harmlessly off to hide under Mrs. O'Leary's back porch, but will resume their real-life killing and thieving. The rules of sport are conducive to the end sought—amusement—but they are ill-adapted to the enforcement of the criminal law.²¹¹ And if the application of the rule could be divorced from popular prejudices concerning the liquor, gambling, and revenue laws, in the enforcement of which the federal rule saw its greatest growth,²¹² and if a murderer, bank robber, or kidnapper²¹³ should go free in the face of evidence of his guilt, the public would surely arise and condemn the helplessness of the courts against the depredations of the outlaws.²¹⁴

The final argument for the federal rule is that all direct remedies are ineffective to discourage those charged with law enforcement from seeking evidence by illegal means. It has already been pointed out that, as an additional means of reparation for a wrong *done*, the suppression of incriminating evidence can benefit only the guilty. As a punishment of the officer, the release of his quarry is of doubtful value. But it may have a very real effect in discouraging the authorities from using such means in the first instance, if they are not to be able to use the product of their acts.²¹⁵ If it has this effect, it cannot be denied that innocent as well as guilty will benefit. But here we have two vital social needs, the need that crime be repressed and the need "that the law shall not be flouted by the insolence of office".²¹⁶

²¹⁰Now called "G-men and racketeers."

²¹¹It hardly seems cricket to borrow words from the Supreme Court to support this thesis, but in 1927 Justice Stone declared: "A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule." *McGuire v. United States*, 273 U. S. 95, 99, 47 Sup. Ct. 259 (1927) (in refusing to extend the federal rule).

²¹²An extensive sampling of cases following the federal rule reveals that the great majority of these cases involved seizure of liquor.

²¹³The evidence used against Hauptmann, the kidnapper of the Lindbergh baby, was seized without a warrant; would it have served the cause of justice—and would public respect for law have been enhanced—if this evidence had been excluded? (The source of this information is the speech of Justice Lewis in the New York Constitutional Convention of 1938. *RECORD*, p. 470. Since the law is settled in New Jersey, it is not mentioned in the report of the case. *State v. Hauptmann*, 115 N. J. L. 412, 180 Atl. 809 [1935]).

²¹⁴See *Roberts v. People*, 78 Colo. 55, 243 Pac. 544, 545 (1926).

²¹⁵The federal rule does not follow this policy to its logical conclusion. It has already been pointed out that the evidence so obtained may be used to convict the truck-driver and the still-tender. It is the "higher-up" who owns the property who is protected. *Connolly v. Medalie*, 58 F. (2d) 629 (C. C. A. 2d 1932).

²¹⁶*People v. Defore*, 242 N. Y. 13, 24, 150 N. E. 585, 589 (1926).

When these vital needs come in conflict, we must move cautiously, lest in our zeal to promote one, we neglect the other. It is much to be doubted, in any event, whether the evil is as widespread as many judges and speakers would have us believe; no factual study has been found. However, in the absence of a factual study of our own, we must meet the problem as if illegal searches and seizures were every bit as prevalent as is claimed.²¹⁷

Has this rule, then, had the effect of discouraging such methods? The large number of cases of illegal searches that continue to arise long after the federal rule is well established in a jurisdiction casts substantial doubt upon its efficacy.²¹⁸ The well-meaning over-zealous officer will not, of course, be deterred by such a rule, for he is probably unaware that his act is unreasonable. And the officer who wilfully abuses his power to show his authority will hardly be deterred by a sanction not directed at him personally. The beneficial effect of the rule, if any it has, must be with respect to police departments whose settled policy is to get evidence in such manner—and if this is their policy, it will continue, for the value of the raid on suspicion and the tapping of wires is fully as great for “getting a lead” as it is for getting evidence useful in court. With the clues thus obtained, which might be sufficient in themselves to convince any jury, the police are thus better armed to go through the formality of seeking out further evidence that a court will accept. Such “fishing expeditions” will not be checked by any such indirect means as rejecting the evidence in court. Therefore, it is to be questioned whether the bare possibility of deterring official lawlessness by this indirect means is sufficient to outweigh the certainty of turning criminals loose.

Justices Cardozo and Holmes both recognized that this is a question of balancing social interests, and they reached opposite conclusions as to which is the lesser evil. The argument of each is wholly speculative, neither appearing to rest on a factual study. This question, like many questions of law, rests ultimately on a question of fact, yet not one of the courts that have passed on it has ever indicated that it had made the factual study that must underlie its conclusion that this remedy will or will not be effective, that one or the other is the lesser evil. Wise judgments cannot be based on mere

²¹⁷King John, in *Magna Charta* (clause 55), pledged: “We will not make any justices, constables, sheriffs or bailiffs, but of such as know the law of the realm, and mean duly to observe it.” But it is certain that, to an unknown extent, some officers are not of that caliber. *THE POLICEMAN’S POCKET LAW BOOK* (1924) 101 contains the following words: “What is the highest law? The law of necessity is the highest law known to man—it is supreme even over the written Constitution.” See *LAWLESSNESS IN LAW ENFORCEMENT*, *infra* note 223, at 106; unfortunately the study does not cover the application of this “legal principle” to search and seizure or to arrest.

²¹⁸The latest A. L. R. annotation cites some 300 such cases, over a six-year period, reaching appellate courts in jurisdictions where the federal rule was well settled—and a correspondingly large number of cases probably arose in trial courts that were not appealed because the exclusion of the evidence prevented a conviction. See (1934) 88 A. L. R. 340.

speculation and unproved assumptions.²¹⁹ There is one factual study that has been made of the effect of the federal rule upon law enforcement in Detroit.²²⁰ Professor Waite of Michigan found that at least one-quarter of those arrested in Detroit for unlawfully carrying concealed weapons were discharged not because they were innocent but because the weapon—indisputable evidence of guilt—had been unlawfully discovered. There were 1,347 armed robberies in Detroit in the year studied, and the gun-toters who were released no doubt had their part in them. This seems a high price to pay for a rule that *may* possibly discourage illegal enforcement.²²¹

The argument that the federal rule hampers efficient law enforcement must be most closely scrutinized, however. For, as Connor Hall so aptly pointed out in one of the early forays in this great battle,²²² if the *direct* remedies against the officers are as effective as their advocates claim, then equally will criminals go free and law enforcement be inefficient. However, if illegal enforcement is thereby checked, it will be a real boon to the innocent citizen, and to gain this benefit we may tolerate some inefficiency in law enforcement. Yet there will always be some over-zealous and some brutal officers, who are no more checked by direct remedies than by indirect, but at least the *direct* remedy punishes *them*, not society; and when, by whatever means, a court is presented with evidence of two crimes, it should punish both, whereas today under the federal rule it may punish neither. In Detroit and probably elsewhere, the "indirect remedy" *has not* discouraged illegal enforcement. It *has* released known criminals in the face of evidence of their guilt.

Let us consider for a moment how these principles have been applied to confessions unlawfully extorted.²²³ Of course, no court will receive confessions obtained as a result of torture or fear, and most courts will reject them if motivated by hope of any material benefit.²²⁴ The nature and degree of the hope or fear which is necessary to exclude the confession need not

²¹⁹"Knowledge is essential to understanding, and the understanding should precede judging." Dissent of Justice Brandeis in *Burns Baking Co. v. Bryan*, 264 U. S. 504, 520, 44 Sup. Ct. 412 (1924).

²²⁰Waite, *Public Policy and the Arrest of Felons* (1933) 31 MICH. L. REV. 749, 763 ff.

²²¹Since this study was published, Michigan has retreated from the federal rule to the extent of making *weapons* admissible. *Supra* note 94.

Professor Waite states, further, that in his observation the rule *encourages* illegal practices, for if the police cannot prosecute an arrested lawbreaker even on positive evidence which they have found, they tend to take the punishment into their own hands—which at least discourages the lawbreaker and silences press criticism of ineffective enforcement.

²²²Hall, *Evidence and the Fourth Amendment* (1922) 8 A. B. A. J. 646, 647.

²²³A full study of the prevalence of the "third degree" is found in NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (Government Printing Office 1931) 13.

²²⁴Under N. Y. CODE CRIM. PROC. § 395, a confession is not rendered inadmissible by the fact that it was induced by hope of benefit except where a promise of immunity has been made by or by the authority of the district attorney. But this is not the law in most states.

concern us here.²²⁵ The important fact to note is that, with rare exceptions, the courts have recognized that the rejection of such evidence is grounded not upon the constitutional privilege against self-incrimination, not upon any policy against ratifying the unlawful means or against encouraging such practices, but squarely and solely upon the ground that a confession so induced is unreliable.²²⁶ This distinction in theory is vitally important when the extorted confession leads to the discovery of independent facts, such as the location of stolen property or of the victim's body.²²⁷ No case has ever refused to receive evidence of these independent facts,²²⁸ and the great

²²⁵Here again there may be said to be a federal rule, which follows the earlier English cases in excluding anything but the spontaneous outpourings of a troubled conscience. The least urging or inducement will exclude the confession. *Bram v. United States*, 168 U. S. 532, 18 Sup. Ct. 183 (1897); *Ziang Sung Wan v. United States*, 266 U. S. 1, 45 Sup. Ct. 1 (1924); *State v. Brick*, 2 Harring. 530 (Del. 1835); *Green v. State*, 88 Ga. 518, 15 S. E. 10 (1891); and many cases cited in the *Bram* case, *supra*. Under this rule, "It would be best to tell the truth" is sufficient to exclude the evidence. *Contra*: *People v. Randazzio*, 194 N. Y. 147, 155, 87 N. E. 112, 115 (1909); *King v. State*, 40 Ala. 314 (1867).

The courts vary on how much is necessary to exclude the confession. Rough handling is generally sufficient. *Lang v. State*, 178 Wis. 114, 189 N. W. 558 (1922). But in New York it is simply considered on the basic question of voluntariness. *People v. Trybus*, 219 N. Y. 18, 113 N. E. 538 (1916). Fear of mob violence is sufficient to exclude the confession. *Taylor v. Commonwealth*, 19 Ky. L. Rep. 836, 42 S. W. 1125 (1897); *Walker v. State*, 2 Tex. App. 326 (1877). Agitation resulting from being shown his father's mangled body is not sufficient. *State v. Crank*, 2 Bailey Law 66, 77 (S. C. 1831). Placing the accused in a "sweat box" or dark, airless cell will exclude the resultant confession. *Ammons v. State*, 80 Miss. 592, 32 So. 9 (1902).

The courts disagree on whether illegally prolonged custody or questioning will exclude the confession. It is material to the question of voluntariness, but is usually held not sufficient in itself to exclude the confession. *People v. Mummiani*, 258 N. Y. 394, 180 N. E. 94 (1932); *State v. Kirby*, 1 Strob. 378 (S. C. 1847). *Contra*: *Regina v. Berriman*, 6 Cox Crim. 388 (N. P. 1854). In Kentucky, a statute excludes confessions obtained by "plying" with questions while in custody. KY. STAT. ANN. (Baldwin 1936) § 1649b; *Commonwealth v. McClanahan*, 153 Ky. 412, 155 S. W. 1131 (1913). This statute does not refer to a single question but to persistent, repeated questions. *Commonwealth v. Long*, 171 Ky. 132, 188 S. W. 334 (1916).

²²⁶The constitutional privilege relates only to testimonial compulsion directed against the defendant as a witness, and has no connection with extra-judicial confessions. See 2 WIGMORE, EVIDENCE (2d ed. 1923) § 823; *State v. Turner*, 82 Kan. 787, 109 Pac. 654 (1910); *Baughman v. Commonwealth*, 206 Ky. 441, 267 S. W. 681 (1924); *People v. Mahon*, 15 N. Y. 384, 386 (1857); *Duffy v. People*, 26 N. Y. 589 (1863).

But courts have frequently confused these very similar principles and rested on the ground of self-incrimination. *Bram v. United States*, 168 U. S. 532, 18 Sup. Ct. 183 (1897); *People v. Loper*, 159 Cal. 6, 112 Pac. 720 (1910); *Evans v. State*, 106 Ga. 519, 32 S. E. 659 (1899); *State v. Simpson*, 157 La. 614, 102 So. 810 (1925); *Jordan v. State*, 32 Miss. 382 (1856) (promptly repudiated in *Belote v. State*, 36 Miss. 96 [1858]); *State v. Thomas*, 250 Mo. 189, 157 S. W. 330 (1913); *Lang v. State*, 178 Wis. 114, 189 N. W. 558 (1922).

²²⁷A closely related problem is involved in the cases on compulsory medical examinations and forcible comparison of shoe tracks, discussed in a note in this issue. (1939) 24 CORNELL L. Q. 437.

²²⁸This statement is just a little too strong. *Jordan v. State*, 32 Miss. 382 (1856), which rested its holding upon self-incrimination, brought out the whole armory of reasons which were later used for the federal rule on search and seizure—the constitutional protection extending to every incident of the violation, the court sanctioning the means, etc. The case was promptly overruled in *Belote v. State*, 36 Miss. 96 (1858), in which counsel cited the case but the court did not. In time even defense counsel

weight of authority will receive in addition so much of the confession as is thereby shown to be true, as evidence of defendant's knowledge of the criminatory facts, which he is then left to reconcile with his innocence if he can.²²⁹ Similarly, if a confession is procured by means of the most

tired of citing it. In spite of the adoption of the federal rule in Mississippi, it still adheres to the prevailing view on this related question. *Smith v. State*, 166 Miss. 893, 144 So. 471 (1932).

²²⁹The prevailing view admits the facts found and so much of the confession as relates strictly to those facts and is explanatory of the discovery. Thus, the fact that the property or body was found as a result of defendant's information will be admitted to show his knowledge of the location. *Lewis v. State*, 220 Ala. 461, 125 So. 802 (1930); *Shufflin v. State*, 122 Ark. 606, 184 S. W. 454 (1916); *People v. Hoy Yen*, 34 Cal. 176 (1867); *Osborne v. People*, 83 Colo. 4, 262 Pac. 892 (1927); *State v. Brick*, 2 Harring. 530 (Del. 1835); *Rusher v. State*, 94 Ga. 366, 21 S. E. 593 (1894); *People v. Ascey*, 304 Ill. 404, 136 N. E. 766 (1922); *State v. Moran*, 131 Iowa 645, 109 N. W. 187 (1906); *State v. Turner*, 82 Kan. 787, 109 Pac. 654 (1910); *Baughman v. Commonwealth*, 206 Ky. 441, 267 S. W. 681 (1924); *Commonwealth v. Knapp*, 9 Pick. 496, 511 (Mass. 1830); *Smith v. State*, 166 Miss. 893, 144 So. 471 (1932); *State v. Simas*, 25 Nev. 432, 62 Pac. 242 (1900); *State v. Due*, 27 N. H. (7 Foster) 256 (1853); *Duffy v. People*, 26 N. Y. 589 (1863), *aff'd* 5 Park. Cr. 321 (Sup. Ct. 1862); *State v. Lowry*, 170 N. C. 730, 87 S. E. 62 (1915); *Laros v. Commonwealth*, 84 Pa. 200 (1877); *Dupuis v. State*, 14 Ohio App. 67 (1918); *State v. Danelly*, 116 S. C. 113, 107 S. E. 149 (1921); *Collins v. State*, 169 Tenn. 393, 88 S. W. (2d) 452 (1935); *State v. Conklin*, 109 Vt.—, 194 Atl. 378 (1937); *United States v. Richard*, Fed. Cas. No. 16154 (C. C. D. C. 1823) (the last case on the point in any federal court!); *Rex v. Lockhart*, 1 Leach C. C. 386, 168 Eng. Rep. 295 (1785); see 2 EAST P. C. (1803) 658.

Under this view, it is improper to admit defendant's admission that he *stole* the goods or *placed* them in the place where they were found, since nothing but his *knowledge* of the location is corroborated by the discovery. And the goods must be *identified* independently of the confession, because the accused might have given up money or property of his own to buy peace. *Whitley v. State*, 78 Miss. 255, 28 So. 852 (1900); *State v. Due*, *supra* (both reversing on this ground; the rule is so stated in the other cases above).

Profs. Wigmore and Chamberlayne have attacked these limitations on the rule, believing that the partial corroboration is sufficient to give some credit to the confession as a whole. 2 WIGMORE, EVIDENCE (2d ed. 1923) § 858; 2 CHAMBERLAYNE, MODERN LAW OF EVIDENCE (1911) § 1614. Their view is adopted by statute in Texas, TEX. CODE CRIM. PROC. (Vernon 1926) § 727; *Greer v. State*, 116 Tex. Cr. 491, 32 S. W. (2d) 845 (1930). It has had occasional support in the cases. *Frederick v. State*, 3 W. Va. 695 (1869); *Rex v. Griffin*, Russ. & R. 151, 168 Eng. Rep. 732 (1809) (Lord Ellenborough, admitting the money surrendered by the accused, without independent identification; the same court on the same day, by a slight realignment of the judges, "*Ellenborough dubitante*", went the other way in *Rex v. Jones*, Russ. & R. 152, 168 Eng. Rep. 733 [1809]; the ground of distinction is difficult to perceive); *Regina v. Gould*, 9 Car. & P. 364, 173 Eng. Rep. 870 (N. P. 1840) (admitting statement that he had *placed* the lantern where it was found). And see dissent in *Berry v. United States*, 2 Colo. 186 (1873).

A few English decisions have gone to the other extreme from the *Griffin* case, *supra*, and, while admitting the facts found, refuse to permit any reference to the confession or any showing that the defendant had knowledge. *Rex v. Warickshall*, 1 Leach C. C. 263, 168 Eng. Rep. 234 (1783); *Rex v. Harvey*, 2 East P. C. 658 (1800); *Regina v. Berriman*, 6 Cox Crim. 388 (N. P. 1854). Only one jurisdiction in the United States follows this rule. *State v. Simpson*, 157 La. 614, 102 So. 810 (1925) (resting on self-incrimination but avoiding the logical conclusion that the *facts* found thereby should also be excluded).

It was suggested in *Rusher v. State*, 94 Ga. 366, 21 S. E. 593 (1894) that if *violence* had been used on the defendant instead of mere fear, all the fruits would be suppressed as a matter of public policy, but this dictum has never been applied and its validity has been questioned in *Williams v. State*, 100 Ga. 511, 28 S. E. 624 (1897). The rule in Georgia is already confused enough without this. For a series of incon-

reprehensible of deception, it is fully admissible if the deception was not such as might make the confession untrue.²⁸⁰ This is perfectly defensible on the theory that the extorted confession is excluded only because and to the extent that it is unreliable. But where are all the fine arguments of public policy that many of these same courts expressed when the issue involved evidence obtained by illegal search and seizure? Is there not an equal need to discourage "third degree" methods, by excluding not only the complete confession but also all knowledge gained as a result of it?²⁸¹ Does not the court "ratify the illegal means" when it receives evidence discovered as a result of an extorted confession or receives confessions procured by trickery? Could it be significant that this rule grew up almost entirely in murder and robbery cases, while the federal rule, in its greatest growth, was the step-child of Prohibition?

But in a leading case on the confession question in the United States Supreme Court, *Bram v. United States*,²⁸² the Court sowed the seeds from which there yet may grow another "dangerous heresy". For, with a remarkable lack of historical accuracy, the Court declared that the exclusion of confessions (other than spontaneous utterances made to relieve the conscience) results from the Constitutional privilege against self-incrimination. The case, on its facts, appears to be a square holding that a confession induced by a trick will be excluded.²⁸³ But there are still deeper implications to be found in the opinion and in its adoption of the self-incrimination theory. It may require only a Supreme Court decision, following out these implications, to start the parade for a new "federal rule" excluding not only the entire

sistent cases on analogous points leave this anomalous result: If an officer unlawfully searches a man and finds a gun, it is admissible. *Williams v. State*, *supra*. If he compels the man to tell him that he has a gun, and then finds it, it is admissible. *Rusher v. State*, *supra*. But if he forces the man to hand over the gun, it is forcing him to give evidence against himself and is excluded! *Evans v. State*, 106 Ga. 519, 32 S. E. 659 (1899).

²⁸⁰*McKinney v. State*, 134 Ala. 134, 32 So. 726 (1902); *State v. McKean*, 36 Iowa 343 (1873); *People v. Barker*, 60 Mich. 277, 27 N. W. 539 (1886); *Heldt v. State*, 20 Neb. 492, 30 N. W. 626 (1886); *Commonwealth v. Spardute*, 278 Pa. 37, 122 Atl. 161 (1923); *Wright v. State*, 7 Tex. App. 574 (1880).

There is some doubt as to the federal courts. *Bram v. United States*, 168 U. S. 532, 18 Sup. Ct. 183 (1897), which excluded a confession, could be interpreted as a deception case, since it declares that if, but for inducement, defendant would have remained silent, the communication is inadmissible even though it takes the form of a denial ("He could not have seen me") from which guilt is inferred. Cf. *Lefkowitz v. United States*, 52 F. (2d) 52 (C. C. A. 2d 1931), in which an officer induced a prisoner to write her name without revealing that it was to be used in evidence; the court doubts, but does not pass upon, its admissibility.

And see *Smith v. State*, 88 Ga. 628, 15 S. E. 675 (1895) (doubting the inadmissibility of a tricked confession, but finding other evidence sufficient).

Similarly, the fact that a confession reaches the court through a gross breach of faith by an agent or confidant does not exclude it. *Rex v. Derrington*, 2 Car. & P. 418, 172 Eng. Rep. 189 (1826); *Rex v. Shaw*, 6 Car. & P. 372, 172 Eng. Rep. 1282 (1834).

²⁸¹Cf. *Silverthorne Lumber Co. v. United States*, 251 U. S. 383, 40 Sup. Ct. 182 (1920).

²⁸²168 U. S. 532, 18 Sup. Ct. 183 (1897).

²⁸³See *supra* note 230. Cf. *Gould v. United States*, 255 U. S. 298, 41 Sup. Ct. 261 (1921) (search procured by means of fraud is equivalent to one with force).

statement of the defendant but also the facts discovered thereby.²³⁴ There are already a few lonesome bell-ringers for this rule in those courts which exclude the results of compulsory medical examinations and forcible comparison of shoe tracks with the defendant's feet or shoes.²³⁵ The *Bram* case contains the seeds of a heresy fully as dangerous as did the *Boyd* case.²³⁶ Let us hope that it has fallen upon barren ground, as now seems to be the case.²³⁷

It appears, therefore, that none of the arguments so eloquently propounded in the search and seizure cases have been accepted by the courts of a great majority of jurisdictions when the question of illegal arrest or extorted confession was before them.²³⁸ When a person is unlawfully arrested, whether within or without the state, whether the kidnapping is effected by private persons or by the connivance of the governor himself, a federal court and nearly every state court will take jurisdiction if the person is before it. When a person is brutally beaten by the police and a confession is extorted which leads to discovery of other facts, all courts will receive these facts. But when the question is search and seizure, nearly half the courts of this country declare that they will not receive either the evidence so obtained or any evidence discovered as a result thereof! We submit that the courts should recognize in these latter cases, as they have in the others, that two evils cannot be set off against each other.

IV. REMEDIES

Repeated reference has been made to "direct remedies" which will be more appropriate to prevent and to punish illegal enforcement. But it is said that these remedies are ineffective. If so, the Legislature or its good right arm, the Law Revision Commission, should make a thorough study of the problem of devising effective direct remedies, to make the constitutional guaranty "a real, not an empty blessing". We can here only make suggestions, for we have made no study.

Let us look first to the civil remedy. If it is true, as the *Weeks* case²³⁹

²³⁴No federal case squarely in point has been found in the digests later than 1823. *United States v. Richard*, Fed. Cas. No. 16154 (C. C. D. C. 1823) (following the orthodox view).

²³⁵See note in this issue. (1939) 24 CORNELL L. Q. 437.

²³⁶*Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524 (1886).

²³⁷A ray of hope may be seen in *Holt v. United States*, 218 U. S. 245, 31 Sup. Ct. 2 (1910), holding (per Justice Holmes) that the privilege against self-incrimination does not exclude testimony as to the forcible trying on of a blouse. But the case relies on the *Adams* case, and much water has passed under the bridge since then.

²³⁸It is not readily understandable why the courts should line up as they do on these three closely related questions. Not one of the courts that exclude search and seizure evidence is found among the few that dissent on the other rules, while the dissenters on the arrest question (Kansas and Nebraska) and on the question of showing knowledge by confessions (Louisiana and possibly Georgia) are all among those that admit evidence obtained by illegal search and seizure!

²³⁹*Supra* note 89.

insists, that (unless the indirect remedy is applied) the Constitutional protection "is of no value" and "might as well be stricken from the Constitution", then likewise the common law sanctions for the trespasses of private individuals are "of no value".²⁴⁰ For the remedy is identical. When a man is illegally arrested, when his home is illegally invaded and his property seized, when the police abuse him in an effort to extort a confession, he is entitled to the same civil remedies as any other person whose rights have been violated. The officer who arrests or searches without a warrant, or who abuses a prisoner, the prosecutor who connives at such acts, and the person who swears out a warrant without probable cause may all be sued for damages, and punitive damages may be awarded.²⁴¹ This is the right of innocent and guilty alike, but it is obvious that a jury will not render any substantial verdict against an officer if he is lucky enough to uncover a crime by his unlawful acts. But is it not true that, in actions for damages, an act is always judged by its results? Socially speaking, the criminal whose crime is revealed has not suffered the same damages as the law-abiding citizen who has been subjected to the indignities of an arrest and a search of his home.²⁴² When a man who later proves to be guilty is arrested or searched, the jury may render a small verdict (if any), which will have little effect in discouraging the officers, although it may cover all the socially recognized damage suffered by the victim.²⁴³ But when the rights of an innocent man are wilfully violated by police and prosecutors, it is not to be supposed that jurors are so lacking in respect for the sanctity of personal liberty that they will not do adequate justice and make the offender regret his acts so that he will seriously consider a change in policy.²⁴⁴

But, unfortunately, few police officers accumulate very substantial fortunes, and judgments against them may avail little. Garnishment of the government

²⁴⁰See *State v. Dillon*, 34 N. M. 366, 370, 281 Pac. 474, 476 (1929).

²⁴¹The classic cases are *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (1765); *Wilkes v. Wood*, 19 How. St. Tr. 1153, 98 Eng. Rep. 489 (1763); *Leach v. Money*, 19 How. St. Tr. 1001 (1765). The largest verdict in these cases was one for £5000 against Lord Halifax, who issued the illegal warrants.

See also *Snead v. Bonnoil*, 166 N. Y. 325, 59 N. E. 899 (1901) (\$500 verdict against officer making an illegal arrest upheld); *Johnson v. Comstock*, 14 Hun 238 (1878) (officer protected by warrant fair on its face, but person who swore out search warrant without cause held liable for \$1000 punitive damages).

²⁴²"He who has voluntarily made his home a den of thieves, a distillery for the manufacture of contraband liquor, a warehouse for infernal machines, or a safety deposit box for forged documents or counterfeit coins, has not sustained the same damages when its sanctity is invaded, as has the citizen who has maintained that sanctity." *Massantonio v. People*, 77 Colo. 392, 236 Pac. 1019, 1021 (1925) (italics supplied).

²⁴³At least eighteen states have gone so far as to say that an arrest is not unlawful at all if it develops that the one arrested has committed a felony, even though the arresting officer was ignorant of it at the time. See *supra* note 46.

²⁴⁴"We do not know whether the public, represented by its juries, is today more indifferent to its liberties than it was when the immunity was born." *Cardozo, J.*, in *People v. Defore*, 242 N. Y. 13, 24, 150 N. E. 585, 589 (1926).

by which they are employed is generally not allowed, in the absence of special statutory provision.²⁴⁵ The government cannot be sued for the tort of a police officer or prosecutor, for their duties are governmental and the rule of *respondeat superior* does not apply.²⁴⁶ Where official bonds are required to be filed, there is a possibility of an action on the bond, but strict construction of the bonds and narrow views as to the parties for whose benefit the bond was given have generally frustrated such action.²⁴⁷

We must devise more effective means of enforcing civil judgments against the officers, by garnishment or otherwise.²⁴⁸ An overhauling of official bonds and the statutes relating thereto might give a more valuable remedy; the terms of the bonds might well be adjusted so that the officer will be indemnified for violations in good faith but will bear the ultimate liability, to the limit of his means, if he wilfully violates the law.²⁴⁹ This would make possible reparation to the victim of the wrong in all cases, would discourage officers from committing wilful wrongs, but would not compel them to act at their peril in performing their duties in good faith.

An alternative would be to provide a remedy against the government by which the officer is employed.²⁵⁰ Difficulties might be encountered with principles of agency, unless the remedial law were so expressed as to assume responsibility for acts in excess of authority. This would provide reparation, but it would hardly discourage the officer, for there would be a tendency for the government to absorb the loss and not pass it on to the offending officer or prosecutor. A private bondsman would feel no such inhibitions and the cost of wilful law violation would fall where it should.

The individual wronged has a right, in addition, to sue for the return of his property, whether it was lawfully or unlawfully seized. But if it is held

²⁴⁵ McQUILLIN, *MUNICIPAL CORPORATIONS* (2d ed. 1937) § 2681; Hall, *The Law of Arrest in Relation to Contemporary Social Problems* (1936) 3 U. OF CHI. L. REV. 345, 346-7. See cases cited in both sources.

²⁴⁶ McQUILLIN, *op. cit. supra* note 245, § 2591; Borchard, *Government Liability in Tort* (1925) 34 YALE L. J. 229, 240-1; David, *Municipal Liability in Tort in California* (1934) 7 SO. CAL. L. REV. 295, 302-4; Hall, *loc. cit. supra* note 245 at 347-8; (1925) 11 VA. L. REV. 315. Recovery has been allowed in Canada. *McSorley v. City of St. John*, 6 Can. Sup. Ct. 531 (1881).

²⁴⁷ It is not the purpose of this article to go deeply into these matters. For a full discussion, see Hall, *loc. cit. supra* note 245 at 346-53. In general, where the abuse is most flagrant—arrest without process—the officer is held to be acting individually and his bondsman is not liable. 6 McQUILLIN, *op. cit. supra* note 245, § 2592.

²⁴⁸ Some states, by statute, permit garnishment of their salaries. ARIZ. REV. CODE (Courtright Supp. 1934) §§ 4277 a-e; COLO. STAT. ANN. (Michie 1935), CODE CIV. PROC. C. 7, §§ 131-132 A.

²⁴⁹ Combining, that is, some features of both liability insurance, in which the bondsman would bear the loss, and a surety bond, in which he recovers over against the officer.

²⁵⁰ See N. Y. Cr. CLAIMS ACT § 12-a (waiver of immunity by state for torts of officers). Cf. *Matter of Evans v. Berry*, 262 N. Y. 61, 186 N. E. 203 (1933) (New York City ordinance authorizing Board of Estimate to make awards, in its discretion, to those injured by police in making arrests; held constitutional as recognition of a moral obligation, not a gratuity; but it rests upon grace and does not confer legal right to compel compensation).

in good faith to be used as evidence in a criminal proceeding, the individual's right of possession is postponed until the needs of justice are satisfied.²⁵¹ He may at once recover whatever property is not found by the court to be of evidentiary value, but must await the final disposition of the case before he can recover the balance (except under the federal rule, where his possessory right is made superior to the requirements of criminal justice unless the original seizure was proper).

The criminal penalties which are provided for oppressive acts of enforcement officers are often, on paper, very severe.²⁵² But prosecutions are rare.²⁵³ The problem, therefore, is to translate the paper remedy into effective actuality. In all too many cases, the acts of which the officer is guilty were done in pursuance of the established policy of the enforcement office, and it is not to be expected that the prosecutor will proceed against him under such circumstances. But a study should be made of the possibility of devising some summary proceeding in the nature of contempt, in which the court would take the initiative, upon affidavits of the offended party calling the wrong to its attention, and upon a hearing of the officer, without the intervention of the prosecutor.²⁵⁴ There would be procedural questions to be

²⁵¹United States v. Wilson, 163 Fed. 338 (C. C. S. D. N. Y. 1908); State v. Magnano, 97 Conn. 543, 117 Atl. 550 (1922); Azparren v. Ferrel, 44 Nev. 157, 191 Pac. 571 (1920); Simpson v. St. John, 93 N. Y. 363 (1883); Smith v. Jerome, 42 Misc. 22, 93 N. Y. Supp. 202 (Sup. Ct. 1905) (Gaynor, J.); Welchek v. State, 93 Tex. Cr. 271, 247 S. W. 524 (1922).

²⁵²Arrests and seizures without a warrant (or justification for acting without one), and abuse of authority in executing a warrant are misdemeanors in New York. PENAL LAW §§ 1846, 1847. The maximum penalty is one year in jail, \$500 fine, or both. PENAL LAW § 1937.

For searches (without a warrant) of private dwellings (or of any other property if done maliciously and without probable cause), the federal law provides \$1000 maximum fine; and for a second offense, the same fine or a year in jail, or both. 18 U. S. C. A. § 53a (Supp. 1938). For exceeding authority in executing a warrant, \$1000 fine or one year or both. 18 U. S. C. A. § 631 (1927).

Wire-tapping by any person, including a federal or state officer, is now a federal felony punishable by a maximum fine of \$10,000 or two years in jail, or both. 47 U. S. C. A. §§ 501, 605 (Supp. 1938).

Unlawful arrest abroad and return to this country without extradition was held to be a kidnapping, irrespective of its purpose to return the fugitive to justice, and extradition of the offending officer to Mexico for prosecution for this offense was allowed in *Villareal v. Hammond*, 74 F. (2d) 503 (C. C. A. 5th 1934). By Statute in New York, it is further made a felony for an officer of this state to *turn a man over* to the agents of another state, even under a valid extradition warrant, until he has first been taken before a court, been informed of the charges and of his rights, and been given an opportunity to contest the legality of the proceeding if he will. N. Y. CODE CRIM. PROC. §§ 838, 839; UNIFORM CRIMINAL EXTRADITION ACT §§ 10, 11 (see *infra* note 268 for states which have adopted this act). A mandatory one-year sentence is provided.

²⁵³In *State v. Wagstaff*, 115 S. C. 198, 105 S. E. 283 (1920), a police officer, and the chief who stood by, were convicted of criminal assault for seizing a grip and searching it unlawfully. This is probably an unusual case; and the punishment decreed is not stated in the report.

Annotations to the statutes imposing such penalties are conspicuous by their absence.

²⁵⁴For an illustration of the use of the contempt procedure where practical reasons make criminal punishment impossible, see *United States v. Shipp*, 203 U. S. 563, 27

determined, as to just what formalities and safeguards would be desired. And, while abuses in the execution of warrants of the court are probably within the constitutional scope of contempt of court,²⁵⁵ arrests and searches without any warrant would seem not to be (despite one dictum suggesting the contrary²⁵⁶). The question would then have to be studied whether this summary proceeding, without formal indictment or information, could constitutionally be applied to such acts by means of a statutory implication of a waiver of this guaranty by persons becoming or continuing members of the police force.

Probably a fine would be more effective than imprisonment as a remedy, in any case, for if a sentence were imposed, there are "very serious doubts whether the marshall would ever be compelled to live upon jail fare".²⁵⁷ It should be provided in that event that the fine imposed might not be paid directly or indirectly from the budget of the enforcement office.

Another effective remedy, if means can be devised for enforcing it independently of the prosecutor's control, would be forfeiture of the office or employment of anyone, from the prosecutor on down, who wilfully and habitually engages in illegal practices, and ineligibility for later election or employment in the enforcement office.²⁵⁸ But how this may be enforced is a problem that would require study. We can only pose the problems. The Legislature might better study these problems than seek to provide "indirect remedies" of doubtful effectiveness and propriety.

But there is one type of "indirect remedy" that is to be encouraged. That is to strike at the very roots of the problem and remove some of the causes of illegal enforcement, particularly with respect to arrest. We need a realistic reappraisal of long outmoded rules as to arrest.²⁵⁹ When it is recognized just what arrests represent true abuses of the police power, it will be more

Sup. Ct. 165 (1906); s. c., 214 U. S. 386, 29 Sup. Ct. 637 (1909) (original contempt proceeding in Supreme Court against leaders of mob which lynched prisoner after Supreme Court had granted an appeal).

²⁵⁵Cf. *United States v. Hoffman*, 13 F. (2d) 269 (N. D. Ill. 1925), *aff'd*, 13 F. (2d) 278 (C. C. A. 7th 1926); *Westbrook v. United States*, 13 F. (2d) 280 (C. C. A. 7th 1926). In these cases, the sheriff to whom federal prisoners had been committed under a court order, and the jailer (although acting under the sheriff's orders), were adjudged guilty of a contempt in permitting the prisoners to leave the jail. It would seem that improper execution of a search warrant or of a warrant of arrest would fall in the same category. And see *In re Chin K. Shue*, 199 Fed. 282 (D. Mass. 1912), which implies that such a remedy would be available except that the offenders there were customs officers executing a warrant issued by the revenue commissioner and not by the court.

²⁵⁶See *State v. Reynolds*, 101 Conn. 224, 238, 125 Atl. 636, 640 (1924).

²⁵⁷Hall, *Evidence and the Fourth Amendment* (1922) 8 A. B. A. J. 646, 647.

²⁵⁸The exclusion camp in the late Constitutional Convention, as a dying gesture or perhaps as a test of the good faith of their opponents, proposed such an amendment but it was defeated on the ground that it was a matter for the Legislature to decide. CONVENTION RECORD (N. Y. 1938) 620.

²⁵⁹See articles cited *supra* notes 4 and 186.

possible to cope with the problem, and the present too general contempt of the police for the rules may be overcome.

In the field of interstate crime, much progress has been made toward the ideal of "free trade" in criminals.²⁶⁰ The Uniform Fresh Pursuit Act, adopted in at least half the states,²⁶¹ permits officers of another state, provided it makes reciprocal provisions, to continue a close pursuit over a state line after a fleeing felon and to have the same authority to make the arrest that a local officer would have if the crime had been committed in his own state, provided the captive is taken immediately before a magistrate to determine, not his guilt or innocence, but the lawfulness of the arrest. But it is still necessary to obtain extradition, except that New York, as to the states which make reciprocal provisions, permits immediate removal after the hearing before the magistrate, eliminating extradition entirely in the case of close pursuit.²⁶² This is a step in the right direction, for the simpler the extradition process is made, preserving its safeguards but eliminating the "red tape", the less the temptation to ignore it entirely. The permission to out-of-state officers to make arrests would have shocked an earlier age, when such acts were looked upon as little short of an armed invasion. Today, when criminals range freely among the states, we must give "full faith and credit" to the officers of our neighbors, provided they do what they would have to do at home, take the prisoner at once before a magistrate.

An attack on the same problem from another angle has been made by Congress in the Fleeing Felon Law,²⁶³ which makes it a federal offense to travel in interstate commerce with intent to avoid prosecution for certain named felonies.²⁶⁴ Thus, the renowned "G-Men" take up at the state line the chase of those wanted for the more serious crimes. The statute provides for trial where the original crime was alleged to have been committed, so, by the process of removal from one federal judicial district to another, much simpler and more certain than extradition,²⁶⁵ the fugitive is returned to

²⁶⁰See Osler, J., in *In re Parker*, 9 Ont. Prac. R. 332, 335 (1882).

²⁶¹See (1938) 38 Col. L. Rev. 705. The Act was not proposed by the Commissioners on Uniform Laws, but by the Interstate Commission on Crime, and hence the text is not found in the U. L. A.

²⁶²N. Y. CODE CRIM. PROC. § 860, adopted in 1936. No states making reciprocal provisions have been found, however. New York also broadened the act as to crimes covered—all acts which are crimes under our laws, rather than just felonies.

The same result has been achieved by interstate compact, under the permission of Congress, 18 U. S. C. A. § 420 (Supp. 1938), among Colorado, New Mexico, and Wyoming, permitting each other's officers to arrest fugitives with no formalities but their own authority, waiving all requirements of extradition. Although Kansas did not accept this part of the compact, the full text is found in KANS. GEN. STAT. (1935) § 62-2503.

²⁶³18 U. S. C. A. § 408c (Supp. 1938), 48 STAT. 782 (1934).

²⁶⁴Murder, kidnapping, burglary, robbery, mayhem, rape, assault with a dangerous weapon, or extortion accompanied by threats of violence, or attempt to commit any of these crimes.

²⁶⁵18 U. S. C. A. § 591 (1927). Removal between federal districts is very informal.

the state where he is wanted for the original crime. And it is tacitly understood that upon his return he will be turned over to the state authorities for prosecution for the original, more serious offense.²⁶⁶

The simplification of interstate arrest under these various statutes—which preserve the safeguard of an immediate hearing where the accused is found—removes much of the temptation to unlawful arrests in other states. Another major temptation, resulting from the non-extraditability of those who were not in the state where the crime was consummated, has been attacked from two angles. Under the leadership of Wisconsin²⁶⁷ and the sponsorship of the Commissioners on Uniform State Laws,²⁶⁸ the gap in the Constitution has been filled by state statutes providing for the extradition of non-fugitives. Thus, the man who shoots across the state line or defrauds another without entering the state may be returned under the forms of law and is no longer granted an immunity that could be overcome only by kidnapping him. Alternatively, or in addition, some statutes now provide that where a force is set in motion or a duty omitted, within the state, which results in the consummation of a crime in another state, it is punishable in the former state just as if the whole crime had been completed there.²⁶⁹ Thus, the

The prisoner is identified as the person named in a federal indictment, and the district judge signs a removal order, the indictment itself being *prima facie* evidence that the prisoner is charged with crime in another state.

²⁶⁶See *United States v. McClure*, 15 Fed. Supp. 931 (E. D. Tenn. 1936). On the constitutionality of the Act, see Brabner-Smith, *The Commerce Clause and the New Federal "Extradition" Statute* (1934) 29 ILL. L. REV. 335. The practice of removal to the jurisdiction for a federal offense followed by trial in the state court for another crime was justified by analogy to the *Lascelles* case, *supra* note 25, in *In re Little*, 129 Mich. 454, 89 N. W. 38, 57 L. R. A. 295 (1902).

²⁶⁷L. 1919, c. 559. Wisconsin modified its statute in accordance with the Uniform Act in 1933. WIS. STAT. (1933) § 364.06.

²⁶⁸UNIFORM CRIMINAL EXTRADITION ACT § 6, adopted in Alabama, Arkansas, Arizona, California, Delaware, Idaho, Indiana, Kansas, Maine, Maryland, Massachusetts, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Utah, Vermont, West Virginia, Wisconsin, Wyoming. But New York, to protect residents who had not been in the demanding state, added a proviso that the crime charged must be such as would be a crime under its own laws and that the Governor may, in his discretion, make the surrender conditional on the granting of immunity from prosecution for other crimes until the prisoner has had an opportunity to leave after acquittal or after serving his term; and its section does not apply to libel. N. Y. CODE CRIM. PROC. § 834. The Uniform Act changes the rule of the *second* case of *State v. Hall*, 115 N. C. 811 (1899), *supra* note 7.

²⁶⁹This changes the rule of the *first* case of *State v. Hall*, 114 N. C. 909 (1904), *supra* note 7. A pioneer in this regard was California. *People v. Botkin*, 132 Cal. 231, 64 Pac. 286 (1901) (poisoned candy mailed from California to Delaware, where recipient ate it and died; held to be a murder triable in California). See *e.g.*, ALA. CODE ANN. (Michie 1928) § 4893; CAL. PENAL CODE (Deering 1937) § 27; MICH. COMP. LAWS (1929) § 17126; N. Y. PENAL LAW § 1930; WIS. STAT. (1937) § 353.29. Furthermore, *Inadequacy of the Present Federal Statute Regulating Interstate Rendition* (1910) 10 COL. L. REV. 208, n. 2, says that a majority of the states have so provided. Reid, *Interstate Rendition for Extra-Territorial Crimes* (1920) A. B. A. REP. 432, expresses the view that this is the less effective of the two remedies, for those most interested in a prosecution are far away.

absentee criminal, immune from extradition in the absence of special statute, becomes liable to prosecution in the state of his residence.

Perhaps the most effective remedy of all has yet to be mentioned. Law enforcement officers are peculiarly sensitive to the power of the press. When newspapers begin to editorialize on their failure to solve a notorious crime, the police "get on their toes". (Sometimes, in their anxiety to "solve" the crime and placate the clamor of the press, they also get on the toes of innocent victims.) Of late the press has been demanding in editorials that these criminals be released in the face of evidence of their guilt, if the seizure of such evidence was improper. If the newspapers would devote their energies and their facilities to an unbiased investigation of the true situation in illegal enforcement in each city—illegal arrests, search and seizure, and the "third degree"—and would then concentrate on arousing public opinion by turning the white light of publicity on the practices, wherever and if ever they exist, if they would put pressure on prosecutors to cease encouraging such practices and to discharge or discipline offending officers, and if they would tell the public at election time whether the prosecutor has been careless of individual rights and liberties, they could accomplish a great and constructive public service. At present the public may only make its choice between highly dramatized but poorly supported assertions on the one side and categorical denials of the prosecutors on the other.²⁷⁰ Facts and figures, gathered and presented by newspapers respected for their integrity, and driven home to the public in an active campaign to improve the quality of law enforcement, could do much to end the practices if and where they exist or to still the clamor of the exclusionists if the evil is not all that is claimed.

If these remedies, or some of them, were applied and proved effective, the question of using evidence illegally obtained or of trying the prisoner illegally arrested would seldom arise. But when it did arise, there could be only one answer. The release of one criminal in the face of evidence of his guilt is *never* a *proper* remedy for the wrong of another. If effective direct remedies are devised, as we believe they can be, none can claim that it is a *necessary* remedy. Its indirect effect in discouraging illegal enforcement may—or may not—be of great value. But the consequences to society of releasing accused criminals, not because they have been denied a fair trial but because of the wholly collateral wrong committed in apprehending them

²⁷⁰Cf. *People v. Mummiani*, 258 N. Y. 394, 398-403, 180 N. E. 94, 95-98 (1932), in which Judge Lehman (Cardozo, C. J., and Pound, J., concurring) declares that it is the prosecutor's duty to explain the circumstances of the obtaining of a confession and not leave the jury to choose blindly between the highly interested assertions of the accused and the categorical denials of the police. (The case presents an interesting dilemma, for these three judges voted to reverse on this ground, while one, disagreeing on this point, found another error. The case was reversed, four to three, but no majority agreed on any particular error. What was the trial court to do?)

or in discovering their crime, are too great to justify this indirect attack on the problem.

Our conclusion could not be better expressed than in the language of the late Justice Cardozo:

"The law . . . is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an *opportunity to defend*. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained until it is narrowed to a filament. *We must keep the balance true.*"²⁷¹

²⁷¹Snyder v. Massachusetts, 291 U. S. 97, 122, 54 Sup. Ct. 330, 338 (1934) (the case held due process was not denied when defendant was not present at a "view"). Italics the writer's.